No. —616

FILED
DEC 10 195
JOHN T. FEY, CL

Supreme Court of the United States

OCTOBER TERM, 1956

MOUNT VERNON MORTGAGE CORPORATION, et al., NATIONAL HOME LIBRARY FOUNDATION AND FANNIE SESSIONS MITTELL, *Petitioners,*

v.

THE UNITED STATES, as Parens Patriae, by its Attorney General,

and

J. HOWARD MCGRATH, Attorney General of the United States, in behalf of the unknown beneficiaries of the National Home Library Foundation, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DEAN ACHESON,
DONALD HISS,
ROBERT W. TALLMAN,
701 Union Trust Building,
Washington, D. C.,
Attorneys for Petitioners.

COVINGTON & BURLING,
Of Counsel.

DECEMBER, 1956.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Federal Rule of Civil Procedure Involved	2
Statement	2
Reasons for Granting the Writ	4
I. Failure to Substitute Attorney General McGrath's Successors in Compliance with Rule 25(d) Resulted in Abatement of the Action, and Refusal of the Court Below so to Order Conflicts Directly with Decisions of this Court	4
a. *Rule 25(d) was applicable and required abatement according to applicable decisions of this Court*	4
b. *The Attorney General was and is a necessary and indispensable party*	10
1. Under the Law of England the Attorney General was and is a necessary and indispensable party	12
2. Throughout the United States the Attorney General is a necessary and indispensable party	16
a. In some states the Attorney General is made a necessary and indispensable party by statute	17
b. In other states the Attorney General is a necessary and indispensable party as a matter of common law	18
3. The indispensability of the Attorney General as a party in this case was virtually conceded by the Government	19
II. There Is A Pressing and Current Need for Reaffirmation of Principles by this Court With Respect to Rule 25(d) in Order to Eliminate Confusion in Appellate Jurisdiction	21
Conclusion	27

CITATIONS

Cases:

Acheson v. *Furusho*, 212 F.2d 284 (9th Cir. 1954) 23, 24, 25, 26

Alstate Construction Co. v. *Tobin, Secretary of Labor*, 344 U.S. 926 (1953) 8, 23

Attorney General v. *Green*, 1 Jac. & W. 303; 37 Eng. Rep. 391 (1820) 15

Cases—Continued

	Page
Attorney-General v. *Wyggeston's Hospital*, 16 Beav. 313; 51 Eng. Rep. 799 (1852)	16
Baltimore v. *Peabody Institute*, 175 Md. 186, 191-192; 200 Atl. 375, 378 (1938)	11
Banks & Rumbaugh v. *Tobin, Secretary of Labor*, 345 U.S. 942 (1953)	9, 23
Barnum et al. v. *Mayor of Baltimore*, 62 Md. 275, 299, 50 Am. Rep. 219 (1884)	11
Bowles v. *Wilke*, 175 F.2d 35 (7th Cir. 1949) cert. denied, 338 U.S. 861	22
Burns et al. v. *Lovett, Secretary of Defense et al.*, 344 U.S. 936 (1953)	8, 23
Chew Yin v. *Acheson*, 216 F.2d 60 (7th Cir. 1954)	23
Cold Metal Process Co. v. *United Engineering & Foundry Co.*, 351 U.S. 445 (1956)	21
Defense Supplies Corp. v. *Lawrence Warehouse Co.*, 336 U.S. 631 (1949)	22
Dickey v. *Volker*, 321 Mo. 235, 246-47; 11 S.W.2d 278, 281	19
Fay v. *Hunster*, 181 F.2d 289	11 12
Fix, Collector of Internal Revenue v. *Philadelphia Barge Co.*, 290 U.S. 530 (1934)	9, 10, 22, 23
Fleming v. *Goodwin*, 165 F.2d 334 (8th Cir. 1948), cert. denied, sub nom. *Goodwin* v. *U.S.*, 334 U.S. 828	10, 22
Fleming v. *Mohawk Co.*, 331 U.S. 111, 119 (1947)	8, 22, 23
Fleming v. *Rhodes*, 329 U.S. 688 (1946)	8, 23
Halsey et al. v. *Convention of the Protestant Episcopal Church et al.*, 75 Md. 275, 281-282, 23 Atl. 781, 782 (1892)	11
Johnson et al., Doing Business as Bramball Co. v. *Tobin, Secretary of Labor*, 344 U.S. 926 (1953)	8, 23
Joint Anti-Fascist Refugee Committee et al. v. *McGranery, Attorney General, et al.*, 345 U.S. 911 (1953)	9, 23
Jordan v. *Landis, Attorney General*, 128 Fla. 604, 610; 175 So. 241, 244	19
Ladner, Collector v. *Philadelphia Barge Co.*, 63 F.2d 258 (3rd Cir. 1933)	9
Lehmann v. *Acheson*, 109 F. Supp. 751, 755 (D.C.E.D. Pa. 1953)	24
Lehmann v. *Acheson*, 214 F.2d 403 (3rd Cir. 1954)	23, 24, 25, 26
Lew Thun v. *McGrath*, 16 F.R.D. 352 (D.C.S.D.N.Y. 1954)	23
MacLaughlin, Collector v. *Philadelphia Barge Co.*, 60 F.2d 333 (D.C.E.D.Pa. 1932)	9
McGranery, Attorney General, Successor to The Alien Property Custodian v. *Vort et al., Trustees*, and *Vort et al., Trustees* v. *McGranery, Attorney General*, 345 U.S. 911 (1953)	8, 9, 23
Murray v. *Porter*, 329 U.S. 687 (1946)	8
Noel v. *Olds*, 138 F.2d 581, 587, cert. denied 321 U.S. 773	11
Northwestern Lumber & Shingle Co. v. *U.S.*, 170 F. 2d 692 (10th Cir. 1948)	10, 22
Orvis et al. v. *McGranery, Attorney General, Successor to The Alien Property Custodian*, 344 U.S. 936 (1953)	8, 23

Cases—Continued

	Page
Parker v. *Porter*, 329 U.S. 687, 688 (1946)	8
Pennington-Winter Construction Co. v. *Tobin, Secretary of Labor*, 344 U.S. 926 (1953)	8, 23
Perkins v. *Elg*, 307 U.S. 325, 350 (1939)	26
Raley et al., Trading as Raley's Food Store v. *Porter*, 329 U.S. 687 (1946)	8
Rossello v. *Marshall*, 12 F.R.D. 352 (D.C.S.D.N.Y. 1952)	23
St. Mary Magdalen College v. *Attorney General*, VI H.L.C. 189, 10 Eng. Rep. 1267 (1857)	13
Sears, Roebuck & Co. v. *Mackey*, 351 U.S. 427 (1956)	21
Snyder v. *Buck*, 340 U.S. 15 (1950)	6, 7, 9, 20, 21, 23, 25, 27
State ex rel. Carmichael, Attorney General v. *Bibb*, 234 Ala. 46, 52; 173 So. 74, 80	19
315 West 97th Street Realty Co., Inc. et al. v. *Porter*, 329 U.S. 688 (1946)	8
Tobin, Secretary of Labor, et al. v. *Little Rock Packing Co. et al.*, 346 U.S. 832 (1953)	9, 23
Tom Wing Po v. *Acheson*, 214 F. 2d 661 (10th Cir. 1954)	23
Traders Compress Co. v. *Tobin, Secretary of Labor*, 344 U.S. 931 (1953)	9, 23
United States v. *Allied Oil Corp.*, 341 U.S. 1, 5 (1951)	10, 18
United States v. *Koike*, 164 F. 2d 155 (9th Cir. 1947)	10, 22, 24
U.S. ex rel. Bernardin v. *Butterworth*, 169 U.S. 600 (1898)	5
U.S. ex rel. Trinler v. *Carusi*, 168 F.2d 1014 (3rd Cir. 1948)	25
Victor et al., Trustees v. *Porter*, 329 U.S. 688 (1946)	8
Victrylite Candle Co. v. *Brannan, Secretary of Agriculture, et al.*, 345 U.S. 975 (1953)	9, 23
Wallace v. *Graf*, 104 F. Supp. 925	12
Wellbeloved v. *Jones*, 1 Sim. & St. 40; 57 Eng. Rep. 16 (1822)	15

Statutes and Federal Rules of Civil Procedure:

Act of Feb. 8, 1899 (30 Stat. 822)	5, 8
District of Columbia Code (1940), ti. 11 §§ 301, 306	3
District of Columbia Code (1951), ti. 11 §§ 305, 306	3
Federal Rule of Civil Procedure 25(d),	2, 4, 5, 6, 7, 8, 9, 10, 12, 19, 20, 21, 22, 23, 24, 25, 26
Judiciary Act of 1925, § 11 (43 Stat. 936, 941)	6, 7, 8, 9
Organic Act of 1801, § 1, D.C. Code (1951) p. xxvii	11
United States Code, ti. 28, § 1254(1)	2
United States Code, ti. 28, § 1345	3

Treatises:

Scott, The Law of Trusts (2d ed. 1956)	13, 14
Shelford, A Practical Treatise of the Law of Mortmain, and Charitable Uses and Trusts, 21 The Law Library, New Series 277 (1842)	13, 14, 15

Miscellaneous:

	Page
British Charitable Donations Registration Act, 52 Geo. III, c. 102 (1812)	16
British Charities Procedure Act, 52 Geo. III, c. 101 (1812)	16
British Charitable Trusts Act of 1853, 16 and 17 Vict., c. 137 (1853)	16
British Charitable Trusts Amendment Act of 1855, 18 and 19 Vict., c. 124, § 44	16
British Statute of Charitable Uses, 43 Eliz., c. 4 (1601)	12, 13, 16
British Parliamentary Committee Report (the Nathan Committee) on the Law and Practice relating to Charitable Trusts. CMD No. 8710 (1952)	12, 15, 16
House Report No. 960, 55th Cong., 2d Sess.	8
House Report No. 308, 80th Cong., 1st Sess. A 239	5
Maryland Annotated Code (1951), Article 16, § 294	18
31 Congressional Record 3865, 3866, 55th Cong. 2d Sess.	8
32 Congressional Record 492, 493, 55th Cong., 2d Sess.	8
32 Congressional Record, 1214, 1215, 1303; 55th Cong. 3rd Sess.	8

Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

MOUNT VERNON MORTGAGE CORPORATION, et al., NATIONAL HOME LIBRARY FOUNDATION AND FANNIE SESSIONS MITTELL, *Petitioners,*

v.

THE UNITED STATES, as Parens Patriae, by its Attorney General,

and

J. HOWARD MCGRATH, Attorney General of the United States, in behalf of the unknown beneficiaries of the National Home Library Foundation, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The District Court's findings of fact and conclusions of law are reported at 128 F. Supp. 629. (R. 32-46.) Judgment was thereafter entered on February 10, 1955. (R. 46, 47, App. A. pp. 1-2.) The majority and dissenting opinions of the Court of Appeals for the District of Columbia Circuit are reported at 236 F. 2d 724. (R. 896-902, App. B. pp. 2-7.)

JURISDICTION

The judgment of the Court of Appeals was entered on July 5, 1956 (R. 903, App. C. p. 8). A timely petition for rehearing was denied on September 11, 1956. (R. 928, App. D. p. 9.) The jurisdiction of this Court is invoked under U.S.C., title 28, Section 1254(1).

QUESTION PRESENTED

Whether Rule 25(d) of the Federal Rules of Civil Procedure applies and requires abatement of an action to enforce a charitable trust in the District of Columbia instituted in the name of the United States, as parens patriae, by its Attorney General, and in the name of the then incumbent Attorney General, when the named Attorney General is succeeded in office before trial and before entry of judgment and the successor Attorneys General are not substituted.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 25(d) of the Federal Rules of Civil Procedure provides in pertinent part:

> "When an officer of the United States, . . . is a party to an action and during its pendency dies, resigns or otherwise ceases to hold office, the action may be continued by or against his successor if within six months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. * * *"

STATEMENT

On September 28, 1951 complaint was filed in the name of "The United States as Parens Patriae, by its Attorney General, and J. Howard McGrath, Attorney

General of the United States, in behalf of the unknown beneficiaries of the National Home Library Foundation. . . ." (R. 2). It was alleged that J. Howard McGrath, then Attorney General of the United States, brought this action in "the execution of his special duties and responsibilities relative to charities." (R. 3). In substance, the complaint alleged that the trustees of the Foundation, in breach of their fiduciary relationship to the Foundation and its unknown beneficiaries had in April, 1940 and January and February, 1943 transferred shares of stock, which were assets of the Foundation, to petitioners for what was alleged to be "inadequate consideration" (R. 3-14). The complaint prayed for the rescission of all such transfers (R. 14).

Jurisdiction of the District Court was based on the provisions of 28 U.S.C., Section 1345, and D.C. Code (1940), Title 11 Sections 301, 306 (now D.C. Code (1951) Title 11 Sections 305, 306). (R. 2).

On May 27, 1952 Attorney General McGrath was succeeded in office by James P. McGranery. An answer to the complaint was filed on June 10, 1952 in which the District Court was requested to dismiss the suit for lack of a proper party plaintiff since McGrath had left office (R. 27).

The case came on for trial two years later, on May 3, 1954. In the meantime, on January 22, 1953, Herbert Brownell, Jr. had succeeded McGranery as Attorney General. Motions to dismiss the suit, because McGrath was no longer in office, because his successors had not been substituted, and because, therefore, the court was without jurisdiction for lack of a necessary party plaintiff, were denied (T. 1938). The District Court's findings of fact and conclusions of law were entered October 22, 1954 (R. 32-46). The facts are not in dis-

pute here and therefore a summary of the findings is inappropriate.

Judgment was entered on February 10, 1955 (R. 46-47) partially granting the relief prayed for. From this judgment petitioners appealed.

Petitioners in their briefs to the Court of Appeals urged the court to remand, with instructions to vacate the judgment and dismiss the action as abated for failure to substitute the successor Attorneys General in compliance with Rule 25(d). A divided court, with a majority and dissenting opinions, filed July 5, 1956 (R. 896-902, App. B. pp. 2-7), affirmed the judgment of the District Court. Implicit in the decision of the Court of Appeals is the holding that Rule 25(d) was inapplicable because the United States was a party and the Attorney General was not a necessary and indispensable party. Petition for rehearing was denied on September 11, 1956. (R. 928, App. D. p. 9.).

REASONS FOR GRANTING THE WRIT

I

FAILURE TO SUBSTITUTE ATTORNEY GENERAL MC GRATH'S SUCCESSORS IN COMPLIANCE WITH RULE 25(d) RESULTED IN ABATEMENT OF THE ACTION, AND REFUSAL OF THE COURT BELOW SO TO ORDER CONFLICTS DIRECTLY WITH DECISIONS OF THIS COURT.

A. RULE 25(d) WAS APPLICABLE AND REQUIRED ABATEMENT ACCORDING TO APPLICABLE DECISIONS OF THIS COURT.

When Attorney General McGrath, a necessary and indispensable party plaintiff (see infra, pp. 10 to 21), was succeeded on May 27, 1952 by Attorney General McGranery, this action could have been continued only

by substitution of his successor in compliance with Rule 25(d).[1] McGranery was not substituted for McGrath.[2] Nonetheless, judgment was entered by the District Court on February 4, 1955 (R. 1955, App. A, p. 1), the Court of Appeals affirmed on July 5, 1956 (R. 903, App. C, p. 8) and denied petition for a rehearing *en banc* on September 11, 1956 (R. 928 App. D, p. 9).

On first impression, Rule 25(d) might be viewed as a technical device designed to ensnare unsuspecting litigants. In fact, however, Rule 25(d) protects litigants. The purpose of the Rule, as well as that of its statutory predecessors,[3] is to provide a means for avoiding the harsh common law doctrine which compelled abatement of an action when an official who was a party thereto left office pending final decision. It is familiar history that the need for the remedy which the Rule fulfills was suggested by this Court in *U.S. ex rel. Bernardin* v. *Butterworth*, 169 U.S. 600 (1898). No proposal to abolish the doctrine of abatement was offered, nor was

---

[1] Pursuant to this Rule, an action by or against an officer may be continued by or against such officer's successor if within six months after the successor takes office the court is satisfied that there is substantial need for such continuance.

[2] When McGranery was succeeded by Attorney General Brownell on January 22, 1953 there was no substitution of Brownell.

[3] The Act of February 8, 1899 (30 Stat. 822) which was succeeded by Section 11 of the Judiciary Act of 1925 (43 Stat. 936, 941) satisfied this need. The Rule, which is based on Section 11 of the 1925 Act, became effective September 16, 1938. Section 11 and the Rule, however, remained in a state of coexistence until 1948 when this Section was omitted from the revision of Title 28 of the United States Code for the stated reason that the same ground was covered by Rule 25(d). (H. Rep. 308, 80th Cong. 1st Sess. A 239.) Section 11, being unnecessary, was therefore repealed as of September 1, 1948. (62 Stat. 992, 1,000.)

such a sweeping remedy adopted. The thrust of the Rule and its predecessor statutes is that an action will not abate if the court, in response to a timely motion to substitute the succesor in office, is satisfied that there is substantial need for continuance.

While the question of the need to comply with Rule 25(d) in order to continue the action and to avoid abatement was discussed fully in the briefs filed with the Court of Appeals,[4] no mention was made of this issue by the court below. In refusing Petitioners' request to abate the action for failure to substitute the successors of Attorney General McGrath, pursuant to Rule 25(d), the court in effect held that the United States was the party plaintiff and that the Attorney General was not a necessary party, with the result that the question of the applicability of Rule 25(d) need not be answered.

The refusal of the court below to remand with instructions to the District Court to vacate the judgment and dismiss the action as abated conflicts directly with *Snyder* v. *Buck*, 340 U.S. 15 (1950). In that case, failure to comply with Section 11 of the Judiciary Act

---

[4] In the United States Attorney's "Brief For Appellees," the United States, as parens patriae, by its Attorney General and Attorney General McGrath, it was contended in point I of the Argument: (1) There were two parties plaintiff—the United States and the named Attorney General, McGrath, and even if the Rule applied to the Attorney General the action did not abate as to the United States. That the Attorney General was a necessary and essential party is abundantly clear (see pp. 10 to 21, infra); (2) Rule 25(d) applies only when coercive relief is sought against the incumbent official. That the Rule is not subject to any such limitation is equally clear (see pp. 7 to 8, infra).

of 1925—now Rule 25(d)—and to substitute the successor to Paymaster General Buck, who had been named in the complaint but who resigned after judgment but prior to the notice of appeal, was held to be fatal. The Petitioner had lost "her judgment and must start over." *Id.* at 22. The writ which had been issued against Buck related to a duty which attached to the office of the Paymaster General and this duty existed "so long and only so long as the office was held. When Buck retired from office, his power to perform ceased. He no longer had any authority over death gratuity allowances. Moreover, his successor might on demand recognize the claim asserted and discharge his duty. . . . " *Id.* at 18.

This holding is directly applicable to the instant case since Attorney General McGrath's duty to enforce charitable trusts in the District of Columbia continued so long and only so long as that office was held by him. When he resigned he no longer had any authority over such trusts. Moreover, when McGrath resigned as Attorney General, his successors, upon inquiry into the matter, might have decided that the case lacked merit and in the discharge of their duty have dismissed the complaint.

That *Snyder* v. *Buck, supra,* was concerned with a suit *against* rather than *by* an officer is wholly irrelevant. For the Rule is unmistakably clear that compliance is required in order to continue an action whether the action is brought *by* or *against* an officer. Free from any element of doubt are the provisions of the Rule that an "action may be continued and maintained *by* or *against* his [an officer's] successor, if within six months after the successor takes office it is satisfactorily shown to the court that there is substantial need for

so continuing and maintaining it."[5] [Italics supplied] And this Court has consistently applied the Rule whether an officer was the party plaintiff or the party defendant.[6] So the conclusion is unavoidable that the

---

[5] The legislative history of the statutes from which the Rule is derived fully confirms this conclusion, if confirmation were needed. The bill which ultimately became the Act of Feb. 8, 1899 provided, in the form in which it passed the House, for substitution in any action commenced *by* or *against* an officer of the United States. (32 Cong. Rec. 3865, 3866, 55th Cong., 2d Sess.; see also H. Rep. No. 960, 55th Cong., 2d Sess.) In the Senate the bill was amended to apply only to actions commenced *against* such officers. (32 Cong. Rec. 492, 493, 55th Cong., 2d Sess.)

In conference, however, the Senate acceded to the House and the bill as sent to the President and signed by him authorized substitution in actions "commenced *by* or *against* the head of any Department or Bureau or other officer of the United States in his official capacity or in relation to the discharge of his official duties. . . ." (32 Cong. Rec. 1214, 1215, 1303; 55th Cong., 3rd Sess.) [Italics supplied].

No change was made in this respect by Section 11 of the Judiciary Act of 1925 (43 Stat. 936, 941) which provided for substitution in an "action, suit or other proceeding brought *by* or *against* an officer of the United States. . . ." [Italics supplied]. This language is retained in Rule 25(d).

[6] Fleming v. Rhodes, 329 U.S. 688 (1946); Fleming v. Mohawk Co., 331 U.S. 111, 119 (1947); Parker v. Porter, 329 U.S. 687, 688 (1946); Murray v. Porter, 329 U.S. 687 (1946); Raley et al., Trading as Raley's Food Store, v. Porter, 329 U.S. 687 (1946); 315 West 97th Street Realty Co., Inc. et al. v. Porter, 329 U.S. 688 (1946); Victor et al., Trustees v. Porter, 329 U.S. 688 (1946); Alstate Construction Co. v. Tobin, Secretary of Labor, 344 U.S. 926 (1953); Johnson et al., Doing Business as Bramball Co. v. Tobin, Secretary of Labor, 344 U.S. 926 (1953); Pennington-Winter Construction Co. v. Tobin, Secretary of Labor, 344 U.S. 926 (1953); Orvis et al. v. McGranery, Attorney General, Successor to The Alien Property Custodian, 344 U.S. 936 (1953); Burns et al. v. Lovett, Secretary of Defense et al. 344 U.S. 936 (1953); McGranery, At-

lower court, in failing to hold that the action had abated, decided an important federal question in direct conflict with *Snyder* v. *Buck, supra.*

Moreover, in failing to reverse and remand with instructions to vacate the judgment and dismiss the action, the court below ignored this Court's opinion in *Fix, Collector of Internal Revenue* v. *Philadelphia Barge Co.*, 290 U.S. 530 (1934), which dealt with Section 11 of the Judiciary Act of 1925, now Rule 25(d). An action which had been instituted by a Collector of Internal Revenue on a bond to assure payment of income taxes had been held to have abated when the government failed to substitute his successor within the period provided by Section 11.[7] Subsequently, a fresh suit was brought on the bond by the then incumbent Collector. The District Court dismissed for the reason that the cause of action as well as the original action had abated and this dismissal was affirmed by the Court of Appeals. This Court reversed but reaffirmed the earlier holding that the initial action had abated for failure to substitute, saying: "Failure to comply with the statute forecloses the particular remedy therein provided; it does not destroy the right." *Id.* at 533.

---

torney General, Successor to The Alien Property Custodian, v. Vort et al., Trustees; and Vort et al., Trustees v. McGranery, Attorney General, 345 U.S. 911 (1953); Joint Anti-Fascist Refugee Committee et al. v. McGranery, Attorney General, et al., 345 U.S. 911 (1953); Victrylite Candle Co. v. Brannan, Secretary of Agriculture, et al., 345 U.S. 975 (1953); Banks & Rumbaugh v. Tobin, Secretary of Labor, 345 U.S. 942 (1953); Traders Compress Co. v. Tobin, Secretary of Labor, 344 U.S. 931 (1953); Tobin, Secretary of Labor, et al. v. Little Rock Packing Co. et al., 346 U.S. 832 (1953).

[7] McLaughlin, Collector v. Philadelphia Barge Co., 60 F.2d 333 (D.C.E.D. Pa. 1932); Ladner, Collector v. Philadelphia Barge Co., 63 F.2d 258 (3rd Cir. 1933).

This principle should have been regarded as controlling by the lower court in the instant case. Failure to comply with the Rule and substitute McGranery for McGrath, within six months after the former succeeded the latter, should, on the basis of the *Fix* case, have been held to have foreclosed the remedy provided in Rule 25(d) of continuing this action in the name of McGranery and later in the name of Brownell. The right to institute a new suit, of course, was not destroyed.

B. THE ATTORNEY GENERAL WAS AND IS A NECESSARY AND INDISPENSABLE PARTY.

The court below apparently accepted the contention advanced by the Government in its brief that, even if Rule 25(d) properly should have been applied with respect to Attorney General McGrath, mere designation in the complaint of the United States as a party plaintiff was sufficient of itself to preclude abatement of the action.[8] We submit that this contention cannot withstand analysis of the essential qualities of actions to protect charitable trusts as manifested by more than 300 years of experience in England and underscored

---

[8] In support of this sweeping contention, the Government, in its Brief (p. 18), relied upon United States v. Allied Oil Corp., 341 U.S. 1 (1951); Fleming v. Goodwin, 165 F.2d 334 (8th Cir. 1948), cert. denied, sub nom. Goodwin v. United States, 334 U.S. 828; United States v. Koike, 164 F. 2d 155 (9th Cir. 1947); Northwestern Lumber & Shingle Co. v. United States, 170 F.2d 692 (10th Cir. 1948). None of these cases is in point. This Court did not rule on the applicability of Rule 25(d) in the Allied Oil Corp. case. Moreover, the basis for holding Rule 25(d) inapplicable in the Goodwin, Koike and Northwestern Lumber cases was that the United States was the real party in interest. No such claim was, or in good faith could have been, advanced by the Government in the instant case.

by the attention devoted to the problem by many states in this country. The early British experience is particularly apposite as the law of the District of Columbia is derived from it.[9] Furthermore, quite apart from the basic misconception as to the relationship of the sovereign to the unknown beneficiaries of a charitable institution,[10] if mere designation of the United States as a plaintiff in such an action is permitted to foreclose

---

[9] The common law of the District of Columbia includes as an integral part the law of Maryland prior to the cession of the District territory in 1801. (Organic Act of 1801, Section 1, D.C. Code, p. xxvii (1951 ed.).) Although Maryland did not, until 1931, provide by statute that its equity courts had jurisdiction to enforce charitable trusts upon suit by the Attorney General, the courts of Maryland have consistently held that there was jurisdiction independent of statutory provision to enforce a trust for charitable purposes. See Barnum et al. v. Mayor of Baltimore, 62 Md. 275, 299, 50 Am. Rep. 219 (1884); Halsey et al. v. Convention of the Protestant Episcopal Church et al., 75 Md. 275, 281-282, 23 Atl. 781, 782 (1892); Baltimore v. Peabody Institute, 175 Md. 186, 191-192, 200 Atl. 375, 378 (1938).

[10] The main thrust of the Government's position in this respect is simply that the United States "occupies the position of parens patriae" as to charitable corporations in the District of Columbia. This is, of course, true. Noel v. Olds, 138 F.2d 581, 587, (D.C. Cir.) cert. denied, 321 U.S. 773. But recognition of this fact is merely the beginning, not the end, of inquiry into the relationship between the sovereign, the Attorney General and the unknown beneficiaries of charitable trusts with particular reference to suits instituted in behalf of such beneficiaries. As we show more fully below, the beneficiaries are the real parties in interest in such actions, and, in the face of recognition that the sovereign plays the role of parens patriae, the Attorney General has always been considered the necessary and indispensable party to represent the real-parties-in-interest beneficiaries.

It is important to note in this connection that in none of the cases cited by the Government in its Brief, Noel v. Olds, supra, Fay

application of Rule 25(d), then the Rule is for practical purposes without meaning.

I. UNDER THE LAW OF ENGLAND THE ATTORNEY GENERAL WAS AND IS A NECESSARY AND INDISPENSABLE PARTY

In 1601, England enacted the Statute of Charitable Uses.[11] That Statute had a two-fold objective: first, to provide more fully for reform of abuses in the administration of charitable trusts; and, second, to encourage gifts to charity by listing a great variety of specific charitable purposes.[12] At least one well-recognized authority on the law of trusts has stated that "even before the enactment of the Statute of

---

v. Hunster, 181 F.2d 289, (D.C. Cir.) and Wallace v. Graf, 104 F. Supp. 925, (D.C. D.C.) was the United States a party. Nor did those cases involve the question whether the Attorney General was a necessary and indispensable party to actions concerning protection of charitable trusts. In the words of the Court of Appeals for the District of Columbia in Noel v. Olds, "no more is involved in the present case than application of the doctrine of judicial cy pres." Supra at 587. Furthermore, Fay v. Hunster and Wallace v. Graf underscore the Government's understanding—at least until faced in this case with the consequences of its failure to substitute in accordance with Rule 25(d)—that the Attorney General, through his subordinates, is a necessary and indispensable party. In the Fay case the United States Attorney acted on behalf of the unknown beneficiaries of a potential charitable trust. And in Wallace v. Graf, a petition filed by trustees of a charitable trust seeking exemption from the requirement to file certain accounts was opposed by the United States Attorney, who represented the interests of the unknown beneficiaries.

[11] 43 Eliz., c. 4.

[12] Report of the Committee on the Law and Practice relating to Charitable Trusts. CMD. No. 8710, p. 18 (1952). (Hereinafter referred to as the Nathan Committee Report.) This report was made by a British parliamentary committee, known as Lord Nathan's Committee, which was appointed in 1950 by the Prime Minister to examine the law and practice relating to charities.

Charitable Uses in 1601 suits were brought by the Attorney-General to enforce charitable trusts." [13] Subsequent to the passage of the Statute of Charitable Uses, which provided for the appointment of *ad hoc* commissions to inquire into abuses in the administration of charitable trusts, it remained the responsibility of the Attorney General to initiate suits wherein protection of charitable trusts were involved.[14]

Recognition of an essential distinction between private and charitable trusts brings out the need for the Attorney General as a party in suits concerning charitable trusts and the nature of his relationship to the unnamed and even unknown beneficiaries of such trusts.[15] In the former the intended beneficiaries are

---

[13] 4 Scott, The Law of Trusts, 2753 (2d. ed. 1956). See also Shelford, A Practical Treatise of the Law of Mortmain, and Charitable Uses and Trusts, 21 The Law Library, New Series 277 (1842).

[14] Shelford, op. cit. supra, note 13, at 278; Nathan Committee Report, op. cit. supra, note 12, p. 19.

[15] That the Attorney General is, in effect, the lawyer for the unknown beneficiaries was clearly demonstrated in St. Mary Magdalen College v. Attorney General, VI H.L.C. 189, 10 Eng. Rep. 1267 (1857). There the House of Lords ruled that the Statute of Limitations applied to the Attorney General in an action brought by him on behalf of beneficiaries of a charitable trust. In noting that the real parties in interest were the beneficiaries, it was stated at p. 210: "The Attorney-general is only a part of the machinery by which the rights of others are sought to be enforced. He is no more a party claiming a right than, in an ordinary action at law, the attorney on record is such a person. We must look at the real litigants in this case, and not at those by whose intervention the rights in dispute are endeavoured to be sustained."

It should be noted that Judge Bastian in his dissenting opinion in this case considered the St. Mary Magdalen College case "par-

and must be identified,[16] whereas in the latter the beneficiaries are an anonymous and continually changing group of people with varying degrees of interest in the proper administration of the charity.[17] Owing to the anonymous character and uncertain interests of charitable beneficiaries, they were clearly unable, individually or as a group, through England's Chancery Courts, to compel charitable trustees to perform their obligations. Thus the Crown, in the exercise of its prerogative as *parens patriae*, assumed the responsibility of providing an avenue of relief for those charitable beneficiaries who, for the reason stated above, were incompetent to act for themselves.[18] It became the responsibility of the Attorney General to represent the

---

ticularly applicable" with regard to the question whether the instant action was barred by the statute of limitations. Judge Bastian would have applied the statute of limitations for the following reason: "While it is true that the suit is filed in the name of the United States as parens patriae by the Attorney General and by the then Attorney General of the United States, this suit is not one in which the United States is a party in its own right as no property rights of the United States are in any way involved." App. B, pp. 5-6.

[16] 2 Scott, The Law of Trusts, 806 (2d ed. 1956).

[17] "In the case of a charitable trust there is ordinarily no definite beneficiary, but the trust is enforceable at the suit of the Attorney General. . . . A trustee of a charitable trust is clearly under a duty properly to administer the trust, but it is difficult to see who has the correlative right. The duty can be enforced, as has been stated, in a proceeding brought by the Attorney General, but the duty is not owing to him. It can hardly be said that the duty is owing to the state. Certainly the state as such is not the beneficiary of a charitable trust, except in rare cases; . . . ." Scott, op. cit. supra, note 13 at 2551-2552.

[18] Shelford, op. cit. supra, note 13 at 268-9.

interests of beneficiaries of charitable trusts before the Courts of Chancery.[19]

Suits to enforce and protect charitable trusts were initiated by the Attorney General either in the name of the Attorney General or in his name on the relation of private citizens.[20] But in either event, the law of England left no doubt that the Attorney General was a necessary and indispensable party to proceedings involving charitable trusts. Thus in the landmark case of *Wellbeloved* v. *Jones*, 1 Sim. & St. 40, 57 Eng. Rep. 16 (1822), where a bill in equity was filed by alleged trustees of a charitable trust against the executor of a testator's will to compel payment to them of a legacy in the will for the charitable institution, it was held that "[the] Attorney-General must be made a party. He is to be a party . . . because the King, as *parens patriae*, superintends the administration of all charities, and acts by the Attorney-General, who is his proper officer in this respect." Furthermore, petitions filed in the name, but without the authority, of the Attorney General must be dismissed, *Attorney General* v. *Green*, 1 Jac. & W. 303, 37 Eng. Rep. 391 (1820), and should the Attorney General recommend that a bill thus filed

---

[19] Shelford, op. cit. supra, note 13, at 399. Placing the responsibility in the Attorney General not only provided the representation in court necessary to permit legitimate grievances of the charitable beneficiaries to be heard, but, by centralizing responsibility, it insulated trustees of charitable trusts from multitudinous and vexatious suits.

[20] Shelford, op. cit. supra, note 13, at 424-5. In the event suit was unsuccessful, the relators were liable for payment of court costs. Ibid. This potential liability made citizens reluctant to bring instances of mismanagement of charitable trusts to the attention of the Attorney General. The Nathan Committee Report, op. cit. supra, note 12, at 19.

be dismissed, the relators lack standing to appeal from the court's decision following such a recommendation. *Attorney-General* v. *Wyggeston's Hospital,* 16 Beav. 313, 51 Eng. Rep. 799 (1852).[21]

2. THROUGHOUT THE UNITED STATES THE ATTORNEY GENERAL IS A NECESSARY AND INDISPENSABLE PARTY.

In this country, as in England, it is the Attorney General who is responsible for representing and protecting the interests of beneficiaries of charitable trusts.[22] In many states, unlike England, the duty is expressly

---

[21] The English Parliament has devoted considerable attention to the problem of protecting charitable trusts from the evils of abuse. As noted, supra, page 12, Parliament enacted the Statute of Charitable Uses in 1601, which, inter alia, provided for the appointment of commissions to investigate abuses of administration of charitable trusts. These commissions were, for approximately 200 years, the sole official aids to the Attorney General in his role as representative of the beneficiaries of charitable trusts. The Nathan Committee Report, op. cit. supra, note 12 at 18. In 1812, Parliament enacted the Charities Procedure Act, 52 Geo. III, c. 101, which was intended to simplify and make less expensive enforcement proceedings, and the Charitable Donations Registration Act, 52 Geo. III, c. 102, which directed charitable trustees to register their charities with the government. By the Charitable Trusts Act of 1853, 16 and 17 Vict., c. 137, and the Charitable Trusts Amendment Act of 1855, 18 and 19 Vict., c. 124, §44, Parliament provided for creation of a board of charity commissioners which was to devote all of its time to investigation, recordation and reformation of charitable trusts, thus supplementing the duties of the Attorney General. Finally, Lord Nathan's Committee, in its 1952 Report, noted the fact that the Attorney General was an indispensable party to suits seeking enforcement of charitable trusts and made several recommendations the purposes of which were to assure more systematic and effective supervision of charities.

[22] See Appendix E, pp. 11-14.

imposed upon the Attorney General by statute.[23] In other jurisdictions, following the English tradition, the courts have required the Attorney General to be made a party to suits involving charitable trusts despite an absence of statutory command.[24] In at least four states, the Attorney General is required by statute to supervise the administration of such trusts, as well as to represent the interests of the beneficiaries in suits to enforce charitable trusts.[25]

a. *In Some States the Attorney General Is Made a Necessary and Indispensable Party by Statute.*

Sometimes the duty of the Attorney General to represent the interests of charitable trusts and corporations is set forth in the sections specifying his duties;[26] sometimes in sections dealing with trusts and trustees;[27] and sometimes the Attorney General's function is specified in both the sections dealing with the duties of the office and those relating to control over trusts and trustees.[28] Again provisions of state law vary in the form prescribed for entitling the actions brought to protect and enforce charitable trusts. In some they are brought by the Attorney General in the name of the state.[29]

---

[23] See Appendix E.

[24] E.g., Alabama, Arkansas, Florida, Illinois, Indiana, Nebraska, New Jersey, Texas and Washington. See Appendix E.

[25] California, New Hampshire, Ohio and Rhode Island. See Appendix E.

[26] Maine, Massachusetts and Ohio. See Appendix E, pp. ———.

[27] California, Maryland, Minnesota, Missouri, Tennessee, and Virginia. See Appendix E.

[28] North Carolina. See Appendix E.

[29] California, North Carolina and Virginia. See Appendix E.

Other states are either silent on this point,[30] or permit the Attorney General to bring the action in his own name, the name of the State, or in the name of a beneficiary of the trust.[31] This variety of nomenclature in complaints, as we explain more fully below, is completely without relevance for the basic reason, so succinctly stated by this Court in *United States* v. *Allied Oil Corp.*, 341 U.S .1, 5, that "[r]egardless of captions, the issues in these cases could not change and the real party-in-interest plaintiff has always been the same." That the unknown beneficiaries are the real-parties-in-interest in suits of this kind is plain.[32]

b. *In Other States the Attorney General Is a Necessary and Indispensable Party as a Matter of Common Law*

Several states make the Attorney General a necessary and indispensable party in actions of the kind here involved in the absence of explicit statutory direction to that effect.[33] This requirement is derived in most of these jurisdictions from English law, but others find it inherent in the office of Attorney General.[34]

So whether by statutory or judicial command the rule

---

[30] Maine, Massachusetts, Minnesota, Missouri and Tennessee. See Appendix E.

[31] Ohio. See Appendix E. The Maryland statute provides: "Courts of Equity within this State shall have full jurisdiction to enforce trusts for charitable purposes, upon suit of the State by the Attorney General or upon the suit of any person of persons having an interest in the enforcement thereof." (Flack's Md. Ann. Code, 1951, Art. 16, sec. 294). See Appendix E.

[32] See note 15, supra.

[33] See note 24, supra.

[34] E.g., Texas. See Appendix E.

that in suits of the character here involved the Attorney General is a necessary and indispensable party is universal in Anglo-American jurisprudence. The reason for the widespread acceptance of the rule in this country, as in England, is that, without it, the unknown beneficiaries of charitable trusts lack the standing—and therefore the opportunity—to protect their interests in court.[35]

3. The indispensability of the attorney general as a party in this case was virtually conceded by the government.

The impact of the rule and the reason for it apparently were not lost on the Government in this case—at least when the complaint was filed. For the complaint was styled "The United States as Parens Patriae, by its Attorney General and J. Howard McGrath, Attorney General, in behalf of the unknown beneficiaries of the National Home Library Foundation," a charitable corporation. However, when faced with the uncomfortable truth—called to the attention of the District Court on several occasions by Petitioners—that Attorney General McGrath had resigned from office before trial and before judgment and had been succeeded by McGranery, who, in turn was succeeded by Brownell, and that in neither case had substitution been made in accordance with the clear and unambiguous requirements of Rule 25(d), some explanation was imperative. In order to avert the consequences of its failure to comply with Rule 25(d), the Government took the interesting, and indeed novel, position in its brief to the Court

[35] See e.g., State ex rel. Carmichael, Attorney General v. Bibb, 234 Ala. 46, 52, 173 So. 74, 80; Jordan v. Landis, Attorney General, 128 Fla. 604, 610, 175 So. 241, 244; Dickey v. Volker, 321 Mo. 235, 246-47, 11 S. W. 2d 278, 281.

of Appeals that there were two plaintiffs to this action. This argument is too slight a thing for the heavy task of blocking the impact of Rule 25(d). The question, we submit, is not how many plaintiffs are designated in the complaint, but rather whether lack of a necessary and indispensable party plaintiff, the Attorney General, at the time of judgment compels abatement of the action under Rule 25(d).

The Government concedes, as it must, that "the chief law officer of the sovereign occupying the territory of the District of Columbia, namely, the Attorney General, is charged with the duty of bringing cases of abuse of charitable corporations before the district court." (Brief in the Court of Appeals, p. 30, n. 16). The Government further acknowledges, as it must, that this suit was instituted "in behalf of the unknown beneficiaries of a charitable trust." Having admitted the need of the Attorney General as a party, and having recognized that the unknown beneficiaries—and not the United States—are the real parties in interest, the Government was and is reduced to making the naked claim that Rule 25(d) "obviously has no application to suits filed in the name of the United States" (Brief in the Court of Appeals, p. 18). This suave contention, apparently accepted by the lower courts in this case, would vitiate Rule 25(d) for its effect could be nullified by the simple device of adding the name of the United States to the caption of any suit commenced by or against an officer of the United States. If the judgment of the court below stands Rule 25(d) is on the way out, and not in the manner which this Court in *Snyder* v. *Buck, supra,* indicated as the only appropriate one: "If the rule of abatement and substitution is to be altered

. . . , the amending process is available for that purpose." *Id.* at 20.

Certiorari should be granted in order that this Court can not only resolve the conflict with *Snyder* v. *Buck, supra,* but once again remind the lower courts that, if Rule 25(d) is to be buried, the task of interment belongs alone to Congress.

II

THERE IS A PRESSING AND CURRENT NEED FOR REAFFIRMATION OF PRINCIPLES BY THIS COURT WITH RESPECT TO RULE 25(D) IN ORDER TO ELIMINATE CONFUSION IN APPELLATE JURISDICTION.

Even if this case represented the sole departure by lower courts from the principles laid down by this Court in *Snyder* v. *Buck, supra,* review would be warranted to resolve the conflict of decisions and to make it clear once again that it is not a function of the judiciary to alter the plain requirements of Rule 25(d). But the decision below does not stand alone in this respect; rather it is merely symptomatic of a pervasive tendency in recent years of the lower courts so to construe the Rule as to render it meaningless. The cause of the strained interpretations offered by the lower courts may be unclear, but there is no doubt as to their effect. The highly important federal question of the scope of Rule 25(d) is presently in even greater need of clarification than at the time *Snyder* v. *Buck, supra,* was decided.[36]

---

[36] The problem is no less acute in this respect than that which recently confronted this Court in Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956) and Cold Metal Process Co. v. United Engineering & Foundry Co., 351 U.S. 445 (1956).

Confusion began shortly after World War II. Three Courts of Appeals held that if "the real party in interest" was the United States, the Rule was inapplicable.[37] But another, the Court of Appeals for the Seventh Circuit—rightly we submit—disagreed.[38] It enforced the Rule on the authority of this Court's decisions in *Fleming* v. *Mohawk, supra, Fix, Collector of Internal Revenue* v. *Phila. Barge Co., supra,* and *Defense Supplies Corp.* v. *Lawrence Warehouse Co.,* 336 U.S. 631 (1949).[39] This Court denied the Government certiorari.[40]

When the new Administration came into office in January, 1953, the Department of Justice was con-

---

[37] Fleming v. Goodwin, 165 F.2d 334 (8th Cir. 1948), cert. denied sub nom., Goodwin v. U.S., 334 U.S. 828; U.S. v. Koike, 164 F.2d 155 (9th Cir. 1947); Northwestern Lumber & Shingle Co. v. U.S., 170 F.2d 692 (10th Cir. 1948).

[38] Bowles v. Wilke, 175 F.2d 35 (7th Cir. 1949), cert. denied, 338 U.S. 861.

[39] If the Rule is construed to be inapplicable when the United States is "the real party in interest", there would remain no areas of applicability. For the United States is "the real party in interest" in all suits by or against an officer, except in an action involving a statute which, after trial, is held to be inapplicable or unconstitutional. By the time of such decision, however, the entire case, including the procedural issue, would be moot with the result that there would be no need to determine whether Rule 25(d) applies.

[40] In his petition, the Solicitor General supported a construction to limit the applicability of the Rule to cases in which the United States was not "the real party in interest" and added that the conflict between the circuits had given rise to a situation which "requires the intervention of this Court" and that "both the question of the abatement of the action and that of the reviewability of the ruling of abatement are important." [See Solicitor General's petition, pp. 6, 7, 15 in Bowles v. Wilke, 338 U.S. 861.]

fronted with many pending cases in which officials, who had been named as parties in suits, were succeeded in office. In this Court the Government promptly moved to substitute the successor officers. Appropriate orders of substitution were entered.[41]

A number of cases were also pending before the lower courts, awaiting trial or argument on appeal, under Section 503 of the Nationality Act of 1940 (8 U.S.C. 1503), against heads of departments who allegedly had infringed plaintiffs' rights claimed as citizens.[42] In these cases the United States Attorneys moved to invoke Rule 25(d).[43] The lower courts, however, denied the motions.

---

[41] See October Terms 1952 and 1953 cases cited in note 6, supra.

[42] Acheson v. Furusho, 212 F.2d 284 (9th Cir. 1954); Tom Wing Po v. Acheson, 214 F.2d 661 (10th Cir. 1954); Lehmann v. Acheson, 214 F.2d 403 (3d Cir. 1954); Chew Yin v. Acheson, 216 F.2d 60 (7th Cir. 1954); Lew Thun v. McGrath, 16 F.R.D. 352 (D.C. S.D.N.Y. 1954). Cf. Rossello v. Marshall, 12 F.R.D. 352 (D.C. S.D.N.Y. 1952), which reluctantly applied the Rule in deference to Snyder v. Buck, supra, and which was mentioned but not followed in the opinion of the same court in the later case of Lew Thun v. McGrath, supra.

[43] The only exception to this practice occurred in the instant case when a wholly inconsistent position was taken by the United States Attorney. In his Brief filed in the Court of Appeals it was contended that Rule 25(d) was inapplicable for the reason that no "coercive" relief was sought against Attorney General McGrath. (See Brief for Appellees, pp. 18-23.) This contention is completely lacking in merit as it collides with Fix, Collector of Internal Revenue v. Phila. Barge Co., supra, Fleming v. Mohawk, supra and Fleming v. Rhodes, supra, and ignores the unequivocal language of the Rule providing for substitution in actions instituted by or against an officer. (See pp. 7 to 8, supra.)

The first Court of Appeals to enter the battle royal was that for the Ninth Circuit. (*Acheson* v. *Furusho*, 212 F. 2d 284 (1953).) This court had already taken a cut at the Rule as inapplicable if the United States is the "real party in interest".[44] It now took another one on the ground that the United States could not be a party in interest. The suit was one for a declaratory judgment. Since, said the court, the judgment "cannot be a command to any head of any governmental department to do anything or to refrain from doing anything, but fixes a status for the plaintiff which all persons inclusive of governmental authorities must respect, the action does not relate to the 'discharge', *i.e.*, the carrying out, of any official duty." *Id.* at 296.

While the Ninth Circuit was gestating this contribution, the Third was by no means idle. In *Lehmann* v. *Acheson* (D.C.E.D. Pa 109 F. Supp. 751, 755 (1953)), the trial court had entered judgment that Lehmann had lost his United States citizenship by expatriation. After appeal had been noticed but before decision, Mr. Dulles succeeded Mr. Acheson as Secretary of State. But no motion was filed to substitute within six months. (*Lehmann* v. *Acheson*, 214 F. 2d 403, 404 (1954).) On July 29, 1953, the Court of Appeals reversed with directions to enter an order declaring Lehmann to be a citizen.

After the mandate had been issued, the United States Attorney, appearing for Acheson and for the United States, moved to recall the mandate and to remand the case to the District Court with directions to dismiss the action as abated, on the authority of the Supreme

---

[44] U.S. v. Koike, 164 F.2d 155 (9th Cir. 1947).

Court's decision in *Snyder* v. *Buck, supra,* and the Court of Appeals' own decision in *U. S. ex rel. Trinler* v. *Carusi,* 168 F. 2d 1014. On October 1, 1953, the Court of Appeals entered an order as so requested in "the belief that the *Buck* and *Trinler* cases were dispositive of the issue," as the court observed in its final opinion in this case (*Lehmann* v. *Acheson,* 214 F. 2d 403, 404 (1954)).

Then came the decision of the Court of Appeals for the Ninth Circuit in *Acheson* v. *Furusho,* 212 F. 2d 284 (9th Cir. 1954). Whereupon the Court of Appeals for the Third Circuit issued "a Rule to Show Cause why the Order of this Court entered October 1, 1953, should not be vacated and our Judgment entered herein on July 29, 1953, reinstated" (*Lehmann* v. *Acheson, supra,* p. 404). On June 18, 1954, that court, by a third decision, produced a masterpiece of reconciliation of the opposing views that the rule was applicable and that it was inapplicable. Its order of October 1, 1953, vacating and setting aside the District Court's judgment, was recalled, Dulles was substituted for Acheson and the cause was remanded to the District Court with directions to enter judgment declaring Lehmann a citizen of the United States. (*Lehmann* v. *Acheson, supra,* p. 406.) The court said that *Snyder* v. *Buck, supra,* was "inapposite" and "not inconsistent" with the conclusion that Rule 25(d) was inapplicable. After quoting from the *Furusho* case, the court reasoned that in *Snyder* v. *Buck, supra,* a court order was sought to compel an officer of the United States to perform an official duty but that in the *Lehmann* case a mere judicial declaration of the petitioner's citizenship status was sought. "Such a declaration 'does not order and cannot constitute an order to the defendant as in mandamus, habeas

corpus, and injunction' as the Ninth Circuit held". *Id.* at 406.

It seems harsh to find fault with reasoning so ingenuous and ingenious. But one is forced to observe that after a final judgment declaring Lehmann to be a citizen, the Secretary of State and his subordinates could hardly refrain from issuing a passport to Lehmann on the grounds that he had lost his citizenship. Indeed, that judgment had precisely the same force and effect as the injunctive relief decreed by the Supreme Court in *Perkins* v. *Elg*, 307 U. S. 325, 350 (1939) which restrained the Secretary of State from denying a passport "on the sole ground that Miss Elg had lost her American citizenship." So it seems clear that the rationale of the *Furusho* and *Lehmann* decisions holding Rule 25(d) inapplicable can hardly be the last word.

CONCLUSION

Since the time is ripe, and overripe, for the elimination of the present confusion, it is accordingly urged that a writ of certiorari to review the decree of the court below should be granted.[45]

Respectfully submitted,

DEAN ACHESON,
DONALD HISS,
ROBERT W. TALLMAN,
701 Union Trust Building,
Washington, D. C.,
Attorneys for Petitioners.

COVINGTON & BURLING,
Of Counsel.

---

[45] Such a result would be appreciably less harsh than the result in Snyder v. Buck, supra, which made it necessary for the claimant to "start over" due to the Government's error in failing to substitute the successor officer, a result from which two members of the Court dissented. In that case, moreover, two other members of the Court dissented for different but somewhat cryptic reasons.

DEC 10 1956

No. — 616

Supreme Court of the United States

OCTOBER TERM, 1956

MOUNT VERNON MORTGAGE CORPORATION, et al., NATIONAL HOME LIBRARY FOUNDATION and FANNIE SESSIONS MITTELL, *Petitioners*

v.

THE UNITED STATES as Parens Patriae, by its Attorney General

and

J. HOWARD MCGRATH, Attorney General of the United States, in behalf of the unknown beneficiaries of the National Home Library Foundation, *Respondents*

APPENDIX TO PETITION FOR CERTIORARI

APPENDIX

	Page
Appendix A.—Judgment of District Court entered February 10, 1955	1
Appendix B.—Majority and Dissenting Opinions of the Court of Appeals, filed July 5, 1956	2
Appendix C.—Judgment of Court of Appeals, entered July 5, 1956	8
Appendix D.—Denial of Petitions for Rehearing, entered September 11, 1956	9
Appendix E.—State Statutes and Decisions	11

APPENDIX A

Judgment

This cause having come on for trial by the Court, without a jury, and the Court having considered the evidence and entered its findings of fact and conclusions of law on October 22, 1954, and it appearing to the Court that there is no just reason for delay in entry of judgment as to certain claims, it is this 10th day of February 1955 expressly directed that final judgment be entered as follows:

1. The relief prayed as to the 667 shares of Longfellow Building Corporation no-par common stock transferred to defendant Mount Vernon Mortgage Corporation in April, 1940, is denied and Count 1 of the Complaint, insofar as it relates to the said 667 shares, is dismissed.

2. The relief prayed as to the 833 shares of Longfellow Building Corporation no-par common stock transferred to defendant Mount Vernon Mortgage Corporation in January, 1943, is granted and said defendant is hereby directed to deliver forthwith to the Clerk of this Court a certificate or certificates for said 833 shares of stock properly endorsed to the National Home Library Foundation.

3. The relief prayed as to the 100 shares of Longfellow Building Corporation no-par common stock transferred to defendant Fannie Sessions Mittell (now Mrs. Ludwig Caminita) in February 1943, is granted in part and denied in part, and said defendant is directed to deliver forthwith to the Clerk of this Court a certificate or certificates for six (6) shares of Longfellow Building Corporation no-par common stock, properly endorsed to the National Home Library Foundation.

4. Defendant Mount Vernon Mortgage Corporation is directed to deliver forthwith to the Clerk of this Court the sum of $147,024.50 to be held by the Clerk for the account of the National Home Library Foundation pending the further order of this Court.

5. Defendant Fannie Sessions Mittell is directed to deliver forthwith to the Clerk of this Court the sum of $1,260.00 to be held by the Clerk for the account of the National Home Library Foundation pending the further order of this Court.

FURTHER ORDERED, that this Court retains jurisdiction for the purpose of appointment of trustees for the National

Home Library Foundation and for the purpose of ascertaining the amount of such dividends as may have been paid since January 1, 1954, or may be paid hereafter to the defendants on the shares of no-par common stock of Longfellow Building Corporation and to order the defendants to pay over to the National Home Library Foundation the proportionate amount of such dividends as the Foundation is entitled thereto, and to enter such further orders as to the Court may seem just and proper in this cause.

BURNITA SHELTON MATTHEWS, *Judge.*

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12705

MOUNT VERNON MORTGAGE CORPORATION, *et al.*, APPELLANTS

v.

THE UNITED STATES as *Parens Patriae*, by its Attorney General, *et al.*, APPELLEES

No. 12707

NATIONAL HOME LIBRARY FOUNDATION and FANNIE SESSIONS MITTELL, APPELLANTS

v.

THE UNITED STATES as *Parens Patriae*, by its Attorney General, *et al.*, APPELLEES

Appeals from the United States District Court for the District of Columbia

* * * * * *

Before EDGERTON, *Chief Judge*, and BAZELON and BASTIAN, *Circuit Judges.*

EDGERTON, *Chief Judge:* The United States as *parens patriae* sues to rescind certain transfers of shares of stock in the Longfellow Building Corporation. The transfers were made by trustees of the National Home Library Foun-

dation, a charitable corporation organized in the District of Columbia. From a judgment in favor of the United States for some of the shares and some dividends, the defendants appeal. They contend among other things that the suit is barred by laches and by a three-year statute of limitations, D.C. Code (1951) § 12-201.

Though the transfers were made several years ago, it is not clear that there was unreasonable delay on the part of the United States in bringing this suit. If the plaintiff were a private person, the statute of limitations might be a bar. *Moran* v. *Schlosberg*, 67 App. D.C. 163, 165, 90 F. 2d 408, 410. But charitable trusts are "favorites with courts of equity." *Ould* v. *Washington Hospital*, 95 U.S. 303, 313. The United States is not suing on behalf of particular beneficiaries, to enforce a "private right, which might have been asserted without the intervention of the United States at all." See *United States* v. *Beebe*, 127 U.S. 338, 346. "A suit for the enforcement of a charitable trust cannot be maintained by persons who have no special interest in the enforcement of the trust. The mere fact that as members of the public they benefit from the enforcement of the trust is not a sufficient ground to entitle them to sue . . . ." RESTATEMENT, TRUSTS, § 391, comment *d*; *cf.* comment *c* (1935). Since the beneficiaries of the National Home Library Foundation are a practically unlimited and wholly indefinite group of persons, unless the United States or the Attorney General can sue to prevent the Foundation's property, which has been dedicated to a public purpose, from being diverted to private profit, no one can sue. This makes the suit analogous to one brought to enforce a public right, and closely analogous to one brought to enforce a right of an Indian tribe. Neither statutes of limitations nor laches apply to suits of either sort. See *United States* v. *Summerlin*, 310 U.S. 414, 416; *Board of Commissioners* v. *United States*, 308 U.S. 343, 351; *United States* v. *Minnesota*, 270 U.S. 181, 196.

We think the court's findings of fact are not clearly erroneous. We have considered appellants' other contentions and find no error affecting substantial rights.

Affirmed.

BASTIAN, *Circuit Judge*, dissenting: While there was very substantial evidence to the contrary, I am not prepared to

say that the findings of the trial court (except as hereinafter noted) in support of the allegations of the complaint were clearly erroneous. (Rule 52(a) F.R. Civ. P.) Accordingly, they must be accepted.

I think too that there is considerable doubt that the Foundation was a charity in the true sense of the word; but, again, I cannot say that the findings of fact on this point were clearly erroneous.

There is also some question in my mind as to whether or not the present case should have been dismissed because of lack of indispensable parties. The judgment of the court removes as trustees two persons who were not parties to the suit and against whom, of course, no relief could or should have been granted. However, it is doubtful that the appellants are in position to claim prejudice to them on this account.

I do not believe that the issues in this case are *res judicata* because of the District Court's holding in the earlier case of *Mahoney* v. *National Home Library Foundation*, Civil Action No. 1979-50, although it closely approaches that case. There Judge Tamm dismissed the case on the ground of laches, but the issues and parties were not the same. It is true that the United States Attorney, as *parens patriae*, was a party to that suit but the action against him was dismissed voluntarily.

Be all this as it may, I think the case should be reversed because any claim was barred by limitations and by laches, and should have been dismissed on either or both of these grounds.

It is to be noted that in these cases no fraud has been found by the District Court. While appellees argue that there was but a short lapse of time between the "discovery" of the "fraud" [14] and the institution of the present proceedings, the fact is that although fraud is alleged in

---

[14] Appellees' position is that they did not know of the sales complained of until the filing of a prior action by an individual with a claim against the Foundation. That action was dismissed on the ground, among others, of the statute of limitations. As will hereinafter appear, the Foundation ceased operations in 1943, and at that time the beneficiaries of the trust (whoever they might be) could have taken action, as could the *parens patriae*. I think the statute began to run at the time the sales were made.

the complaint there is no such finding. The most the trial court found was that the transfer of the stock was "for a shockingly inadequate consideration." The court, in its conclusions of law, held:

> "6. The trustees of the Foundation occupied a fiduciary relationship to it and its unknown beneficiaries. In negotiating the sale of 833 shares of the Longfellow stock in January, 1943 to Mt. Vernon Mortgage Corporation, said trustees failed to inform themselves of the value of the stock and failed to exercise the caution, care and skill which a man of ordinary prudence would exercise in dealing with his property. Due to their failure to perform their duties, the trustees transferred said 833 shares of stock for a shockingly inadequate consideration, and they thereby breached their trust."[15]

The record discloses the main factor in the organization of the Foundation in 1932 was Mr. Sherman F. Mittell, who died in 1942. Upon his death, all interest in the Foundation ceased and operations thereof were discontinued.

For eight years thereafter no action was taken by any one and, in the meantime, prior to the filing of this cause, four witnesses familiar with the transaction died; the records of the Foundation, with few exceptions, had been destroyed; the memories of witnesses had, naturally, faded; and it is obvious that the appellants' defense has been prejudiced by the long delay. In addition, the positions of the appellants have been prejudiced in that they have paid income taxes on the dividends received by them on the stock purchased by them and, as to some if not most of these, it is too late to claim refund.

In my opinion the statute of limitations applies and, even if the statute does not apply, the action is barred by laches. While it is true that the suit is filed in the name of the United States as *parens patriae* by the Attorney General

---

[15] Two of the three trustees against whom these findings and conclusions were directed, who are held to have renounced their offices thereby and who are to be removed, were not even parties to the suit. There is no finding of a fiduciary relationship to the Foundation by the appellants.

and by the then Attorney General of the United States,[16] this suit is not one in which the United States is a party in its own right as no property rights of the United States are in any way involved. If the United States had been a party in its own right, it is probable that neither the statute of limitations nor laches would apply.

It would seem to me that the reasoning of the House of Lords in the case of *St. Mary Magdalen College* v. *Attorney General*, 6 H.L.C. 189, 10 Eng. Rep. 1267, (a somewhat similar suit) is particularly applicable. There the House of Lords said:

> "The statute [of limitations] runs against the Attorney General in cases of this kind, for he comes in, not in his own right or that of the Crown, as such, but as the representative of persons in respect to whose rights the Crown possesses a fiduciary character, and has a fiduciary duty to discharge. . . ."

The House of Lords applied the statute of limitations and not laches to the suit of the Attorney General and held the suit barred because brought too late.

This rule as to the application of the statute of limitations is reinforced by the fact that here the trial court has granted not only equitable relief but legal relief (money judgment) as well. Cf. *Filson* v. *Fountain*, 90 U.S.App.D.C. 273, 197 F.2d 383 (1952).

In fairness to the appellants it should be pointed out that the evidence did not, despite the trial court's ruling, justify a finding that the transactions "were not conducted at 'arm's length'." There was no fiduciary relation between the Foundation and Mt. Vernon and its officers. The court concluded that the purchaser had notice of the breach of trust of the trustees of the Foundation, but I see neither breach of trust nor notice. At most, even if this can be said, the evidence disclosed bad judgment on the part of the trustees; but it took the passage of years, a rising real estate market, and refinancing to develop even this. It is

[16] The suit was filed by The United States of America as *Parens Patriae*, by its Attorney General and J. Howard McGrath, Attorney General of the United States, in behalf of the unknown beneficiaries of the National Home Library Foundation, *Plaintiffs*. No one was substituted in Attorney General McGrath's place on his resignation, nor in the place of his successor when his successor was in turn succeeded by the present Attorney General.

to be noted that the court held a transaction involving 667 shares of the Longfellow stock purchased by Mt. Vernon for $5,000.00 [17] in April 1940 to be on an adequate consideration.

I would reverse the judgment of the District Court and direct the dismissal of the suit.

---

[17] The 833 shares forming the basis of the appeal were purchased in January 1943 for $27,905.50. While it is true that the building was completed in 1941, nevertheless it was a loft type building which would require hundreds of thousands of dollars to convert into a normal office building if the tenant removed. Beginning in July 1942, renewals of the principal lease on the building were from year to year, with the principal tenant (a government agency) having the right to terminate on a thirty-day notice.

APPENDIX C

[Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Jul. 5, 1956. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1956

No. 12,705

MOUNT VERNON MORTGAGE CORPORATION, et al., *Appellants*

v.

THE UNITED STATES as Parens Patriae, by its Attorney General, et al., *Appellees*

No. 12,707

NATIONAL HOME LIBRARY FOUNDATION and FANNIE SESSIONS MITTEL, *Appellants*

v.

THE UNITED STATES as Parens Patriae, by its Attorney General, et al., *Appellees*

April Term, 1956. C. A. 4088-51

Appeals from the United States District Court for the District of Columbia.

Before: Edgerton, Chief Judge, and Bazelon and Bastian, Circuit Judges.

JUDGMENT

These appeals came on to be heard on the record from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in these cases be, and the same is hereby, affirmed.

Dated: July 5, 1956.

Per Chief Judge Edgerton.

Separate dissenting opinion by Circuit Judge Bastian.

APPENDIX D

[Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Sep. 11, 1956. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1956

No. 12,705

MOUNT VERNON MORTGAGE CORPORATION, et al., *Appellants*

v.

THE UNITED STATES as Parens Patriae, by its Attorney General, and J. HOWARD MCGRATH, Attorney General of the United States, in behalf of the unknown beneficiaries of the NATIONAL HOME LIBRARY FOUNDATION, *Appellees*

No. 12,707

NATIONAL HOME LIBRARY FOUNDATION and FANNIE SESSIONS MITTELL, *Appellants*

v.

THE UNITED STATES as Parens Patriae, by its Attorney General, and J. HOWARD MCGRATH, Attorney General of the United States, in behalf of the unknown beneficiaries of the NATIONAL HOME LIBRARY FOUNDATION, *Appellees*

Before: Edgerton, Chief Judge, Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

ORDER

Upon consideration of the petition for rehearing in banc filed by appellants in case No. 12,705, it is

Ordered by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: September 11, 1956.

Circuit Judges Miller and Bastian would grant the petition.

Circuit Judge Burger did not participate in the foregoing order.

[Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Sep. 11, 1956. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1956

No. 12,705

MOUNT VERNON MORTGAGE CORPORATION, et al., *Appellants*

v.

THE UNITED STATES as Parens Patriae, by its Attorney General, and J. HOWARD MCGRATH, Attorney General of the United States, in behalf of the unknown beneficiaries of the NATIONAL HOME LIBRARY FOUNDATION, *Appellees*

No. 12,707

NATIONAL HOME LIBRARY FOUNDATION and FANNIE SESSIONS MITTELL, *Appellants*

v.

THE UNITED STATES as Parens Patriae, by its Attorney General, and J. HOWARD MCGRATH, Attorney General of the United States, in behalf of the unknown beneficiaries of the NATIONAL HOME LIBRARY FOUNDATION, *Appellees*

Before: Edgerton, Chief Judge, Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

ORDER

Upon consideration of the petition for rehearing in banc filed by appellants in case No. 12,707, it is

Ordered by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: September 11, 1956.

Circuit Judges Miller and Bastian would grant the petition.

Circuit Judge Burger did not participate in the foregoing order.

APPENDIX E

State Statutes and Decisions [18]

Alabama *

State ex rel. Carmichael, Atty. Gen. v. Bibb, 234 Ala. 46, 173 So. 74 (1937).

Arkansas *

State ex rel. Attorney General v. Van Buren School Dist., 191 Ark. 1016, 89 S.W. 2d 605 (1936).

California

Cal. Corporation Code, 1955, secs. 9505, 10207. In re Los Angeles County Pioneer Society, 41 C. 2d 45, 257 P. 2d 1 (1953); George Pepperdine Foundation v. Pepperdine, 126 Cal. App. 2d 154, 271 P. 2d 60 (1954).

Connecticut

Conn. Corp. Stat., 1949, c. 10, Sec. 212. Averill v. Lewis, 106 Conn. 582, 591, 138 Atl. 815 (1927).

Delaware *

Trustees of New Castle Common v. Gordy, 33 Del. Ch. 196, 91 A.2d 135 (1952).

Florida *

Jordan v. Landis, Attorney General, on behalf of State, and ex rel. Goodwin, 128 Fla. 604, 175 So. 241 (1937).

Georgia †

Ga. Code Ann., sec. 108-212.

---

[18] In those states designated with an *, an examination of the statutes failed to reveal any law dealing with this subject matter. In those states designated with a †, an examination of the cases of the highest courts of such states failed to disclose any decision on this subject matter. In the following states an examination of the statutes and the cases failed to disclose either a statute or a decision on this subject matter: Arizona, Colorado, Idaho, Kansas, Louisiana, Mississippi, Montana, Nevada, New Mexico, Oklahoma, Utah, Vermont and Wyoming. In the final state, West Virginia, no statute or decision has been found. While the question was raised in Goetz v. Old National Bank of Martinsburg 84 S.E. 2d 759, the State Supreme Court decided this case on other grounds.

Illinois *

People ex rel. Courtney, State's Attorney v. Wilson, 377 Ill. App. 231, 63 N.E. 2d 794; The Art Institute of Chicago v. Castle, A.G. of Ill., 9 Ill. App. 2d 748 (1956).

Indiana *

State ex rel. Emmert, Attorney General et al. v. Union Trust Co. of Indianapolis, 74 N.E. 2d 833, 836, aff'd 227 Ind. 571, 86 N.E. 2d 450 (1949).

Iowa *

Amundson v. Kletzing, Hoegh, as Atty. Gen., 73 N.W. 2d 114, 117 (1955); In re Owens' Estate, 244 Iowa 533, 57 N.W. 2d 193, 196 (1953).

Kentucky *

Jenkins v. Berry, 119 Ky. 350, 83 S.W. 594 (1904).

Maine †

Me. Rev. Stat., 1954, c. 20, sec. 4.

Maryland †

Flack's Md. Ann. Code, 1951, Art. 16, sec. 294.

Michigan †

Mich. Comp. Laws, 1948, sec. 554.352.

Massachusetts

Mass. Ann. Laws, 1952, c. 12, sec. 8. Ames v. Attorney General, 332 Mass. 246, 124 N.E. 2d 511 (1955).

Minnesota

Minn. Stat. Ann., 1947, sec. 501.12. Longeor v. City of Red Wing, 206 Minn. 627, 289 N.W. 570, 574 (1940).

Missouri

Missouri Rev. Stat. Ann., 1942, sec. 5449. Dickey v. Volker, 321 Mo. 235, 11 S.W. 2d 278 (1928).

Nebraska *

Johnson, Atty. Gen. v. Abegg, 147 Neb. 117, 22 N.W. 2d 488 (1946).

New Hampshire †

N.H. Rev. Stat. Ann., 1955, c. 7, sec. 19-32.

New Jersey *

In re Pfizer's Estate, 33 N.J.S. 340, 110 A.2d 40, aff'd 110 A.2d 54 (1954).

New York †

McKinney's N. Y. Laws, Personal Property Law, sec. 12; McKinney's N.Y. Laws, Real Property Law, sec. 113.

North Carolina †

N.C. Gen. Stat., 1950, secs. 36-20, 36-23.1, 55-47.

North Dakota †

N.D. Rev. Code, 1943, sec. 59-0402.

Ohio †

Page's Ohio Rev. Code, 1953, secs. 109.23-109.99.

Oregon *

Wemme v. First Church of Christ Scientist, 115 Or. 281, 237 P. 674 (1925).

Pennsylvania *

Wiegand v. Barnes Foundation, 374 Pa. 66, 97 A.2d 81 (1953).

Rhode Island

R.I. Gen. Laws, 1949-1950, c. 2617, sec. 4. Powers et al. v. Home for Aged Women, 55 R.I. 215, 179 A. 610 (1935).

South Carolina †

S.C. Code, 1952, sec. 1-240.

South Dakota *

In re Geppert's Estate, 75 S. Dak. 96, 104, 59 N.W. 2d 727, 731 (1953).

Tennessee

Williams' Tenn. Code, 1934, secs. 9337, 9339. State, etc. v. Hollinsworth, 193 Tenn. 491, 246 S.W. 2d 345 (1952).

Texas *

Powers v. First National Bank, 138 Tex. 558, 161 S.W. 2d 273 (1942).

Virginia †

Va. Code, 1950, secs. 55-29, 55-30.

Washington •

Kenny Presbyterian Home v. State, 174 Wash. 19, 24 P.2d 403 (1933).

Wisconsin

Wis. Stat., 1953, c. 231.34. In re Goodrich's Estate, 271 Wis. 59, 72 N.W. 2d 698 (1955).

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Federal Rule of Civil Procedure involved	2
Statement	3
Argument	6
Conclusion	18
Appendix	19–33

CITATIONS

Cases:

Acheson v. *Fujiko Furusho*, 212 F. 2d 284	16
Black v. *Magnolia Liquor Co., Inc.*, No. 359, this Term	9
Buck v. *Snyder*, 179 F. 2d 466, affirmed, 340 U. S. 15	7, 17, 18
Chew Yin v. *Acheson*, 216 F. 2d 60	16
Commissioners v. *Sellew*, 99 U. S. 624	13, 15
District of Columbia v. *Pace*, 320 U. S. 698	12
Fix v. *Philadelphia Barge Co.*, 290 U. S. 530	17
Fleming v. *Goodwin*, 165 F. 2d 334, certiorari denied, *sub nom. Goodwin* v. *United States*, 334 U. S. 828	9, 15
Irwin v. *Wright*, 258 U. S. 219	15
Lehmann v. *Acheson*, 214 F. 2d 403	16
Marshall v. *Dye*, 231 U. S. 250	15
Murphy v. *Utter*, 186 U. S. 95	15
Northwestern Lumber & Shingle Co. v. *United States*, 170 F. 2d 692	9, 16
Ralph D'Oench Co. v. *Woods*, 171 F. 2d 112	9
Secretary, The v. *McGarrahan*, 9 Wall. 298	13
Seven Oaks v. *Federal Housing Administration*, 171 F. 2d 947	9
Thompson v. *United States*, 103 U. S. 480	13, 15
Tom Wing Po v. *Acheson*, 214 F. 2d 661	16
United States v. *Allied Oil Corp.*, 341 U. S. 1	9
United States v. *Boutwell*, 17 Wall. 604	13
United States v. *Chandler*, 122 U. S. 643	13
United States v. *Koike*, 164 F. 2d 155	9

Cases—Continued

	Page
United States v. *Schurz*, 102 U. S. 378	13
United States ex rel. Bernardin v. *Butterworth*, 169 U. S. 600	12, 13
United States ex rel. International Contracting Co. v. *Lamont*, 155 U. S. 303	13
United States ex rel. Long v. *Lochren*, 164 U. S. 701	13
Warner Valley Stock Co. v. *Smith*, 165 U. S. 28	13
Williams v. *Fanning*, 332 U. S. 490	10
Statutes:	
Act of February 8, 1899, 30 Stat. 822	12, 15, 16
Judiciary Act of 1925, Sec. 11, 43 Stat. 936, 941, 28 U. S. C. (1934 ed.) 780	15, 17
Nationality Act of 1940 (8 U. S. C. 1503), Section 503	9
District of Columbia Code, Sec. 29–719 (1951 ed.)	12, 14
Miscellaneous:	
31 Cong. Rec. 3866	14
32 Cong. Rec. 491	14
Federal Rules of Civil Procedure, Rule 25 (d)	2, 7, 8, 9, 12, 16
H. R. 6901, 55th Cong., 2d Sess., 31 Cong. Rec. 779	14
H. Rep. No. 960, 55th Cong., 2d Sess	14
H. Rep. No. 308, 80th Cong., 1st Sess., A. 239	16

Page
13
2, 13
13
13
13
10
5, 16
5, 17
9
2, 14
14
14
2, 16
14
14
16

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 616

MOUNT VERNON MORTGAGE CORPORATION, ROBERT T. HIGHFIELD, L. HAROLD SOTHORON, AND E. FLAVELLE KOSS, NATIONAL HOME LIBRARY FOUNDATION AND FANNIE SESSIONS MITTELL, PETITIONERS

v.

THE UNITED STATES, AS PARENS PATRIAE, BY ITS ATTORNEY GENERAL, AND J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, IN BEHALF OF THE UNKNOWN BENEFICIARIES OF THE NATIONAL HOME LIBRARY FOUNDATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court are reported at 128 F. Supp. 629 (R. 32–46) and are reprinted in the Appendix, *infra*, pp. 19–33. The majority and dissenting opinions in the Court of Appeals (Pet. App. B, pp. 2–7) are reported at 236 F. 2d 724.

JURISDICTION

The judgment of the Court of Appeals was entered on July 5, 1956 (Pet. App. C, p. 8). Petitions for rehearing by the same division and by the court *en banc* were denied on September 11, 1956 (Pet. App. D, p. 9). The petition for a writ of certiorari was filed on December 10, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether in an action instituted by the United States as *parens patriae* and by former Attorney General McGrath, for the purpose of recovering the dissipated assets of a District of Columbia-incorporated charity, the failure to substitute McGrath's successor within six months after his resignation requires the abatement of the action and the wiping out of the judgment.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 25 (d) of the Rules of Federal Civil Procedure provides:

> Rule 25. *Substitution of Parties*
>
> * * * * *
>
> (d) Public Officers; Death or Separation from Office. When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily

shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

STATEMENT

This action was brought by (1) the United States, as *parens patriae*, by its Attorney General, and by (2) J. Howard McGrath, then Attorney General of the United States, in behalf of the unknown beneficiaries of a charitable trust, the National Home Library Foundation (hereafter, the charity) (R. 2). The chief purpose of the suit was to recover the controlling stock interest owned by the charity in the Longfellow Building Corporation (hereafter, Longfellow) and transferred to petitioners in 1943 by the charity's trustees (R. 2–14, 45).

The complaint, filed in the United States District Court for the District of Columbia, named as defendants the charity, Mount Vernon Mortgage Corporation (hereafter, Mount Vernon), Mrs. Fannie Mittell, Robert T. Highfield, L. Harold Sothoron, and E. Flavelle Koss. Each of these defendants is a petitioner here. Highfield, Sothoron, and Koss are now and were, at the time of the 1943 transfer, officers and

directors of both Longfellow and Mount Vernon (R. 34–35). Highfield and Sothoron were also, at one time, trustees of the charity (R. 34). Mrs. Mittell has also been an officer and director of Longfellow since July 22, 1942 (R. 69) and a trustee and officer of the charity since 1940 (R. 34, 54).

The trial lasted over three weeks and the trial court heard the testimony of more than 20 witnesses. The evidence showed that on January 19, 1943, the charity transferred to petitioner Mount Vernon—now owned and controlled by petitioners Highfield, Sothoron, and Koss—833 shares of Longfellow stock for the total sum of $27,905.50, or at the rate of $33.50 per share (R. 40–41, 112, 117, 427).[1] Six additional shares of the charity-owned Longfellow stock were turned over to Mrs. Mittell without any consideration at all from her (R. 41, 45–46, 62–63, 72, 123).

The evidence also showed the tremendous disparity between the $33.50 selling price and the actual value of the stock. At the time of the transfer, Longfellow's net earnings, after taxes, averaged $20 per share *annually* for each share of Longfellow stock (R. 227–228, 232–233, 257–258, 795–797). Dividends paid by Longfellow on this stock—bought at $33.50 per share—amounted to $210 on each share for the nine-year period ending in 1953, the last dividend year

[1] At pages 3 to 12 of our brief below, a copy of which has been filed in this Court by petitioners as part of the record, we show how the individual petitioners executed their two-phased plan to acquire ownership of this highly valuable stock for their personal gain: (1) transfer in 1943 of the Longfellow stock to Mount Vernon and to Mrs. Mittell, principally through petitioner Highfield's efforts, and (2) the acquisition of ownership and control of Mount Vernon by Highfield, Sothoron, and Koss in 1945.

prior to the trial (R. 229–230). On the 833 shares, the dividends paid to Mount Vernon during that period amounted to $174,930 (R. 44). For 35 other shares of Longfellow stock purchased by Mount Vernon from private sources in 1947, Mount Vernon paid $1,000 per share, or almost 30 times more than it paid the charity for the same stock (R. 125–127). Thus, it paid less to the charity for the 833 shares than it later paid others for 35 shares of the same stock.

After hearing this evidence, the trial court entered detailed and carefully-documented findings of fact and conclusions of law (R. 32–46; Appendix, *infra*, pp. 19–33). Thereafter, on February 10, 1955, the court entered its judgment which directed petitioners to return to the charity the 839 shares of Longfellow stock which the court found had been acquired by them in 1943 for a "grossly" and "shockingly inadequate consideration" and in breach of trust (R. 42–46). Mount Vernon was also directed to return the sum of $174,930 (representing the 1946–1953 dividends on the 833 shares) less $27,905.50 (the amount paid by Mount Vernon to the charity in 1943 for the 833 shares), or a net amount of $147,024.50 (R. 47). Mrs. Mittell was also directed to return the sum of $1,260, representing the dividends earned by the six shares and paid to Mrs. Mittell (R. 47).

The Court of Appeals affirmed (Pet. App. B, p. 2). It ruled (1) that the trial "court's findings of fact are not clearly erroneous" and (2) that the *parens patriae* action by "the United States or the Attorney General" was essential "to prevent the [charity's] property, which has been dedicated to a public pur-

pose, from being diverted to private profit" (Pet. App. B, p. 3). The court further found "no error affecting substantial rights" in any of the additional contentions asserted by petitioners below and here (Pet. App. B, p. 3). Judge Bastian, while also accepting the trial court's factual findings, dissented (Pet. App. B, p. 3). Petitions for rehearing were denied by the same division and the court *en banc* (Pet. App. D, pp. 9–10).

ARGUMENT

Petitioners do "not * * * dispute here" (Pet. 3–4) the fact—as found by the District Court and affirmed by the Court of Appeals—that they acquired the charity's assets at a "grossly" and "shockingly inadequate" consideration and in breach of trust (R. 44, 45). Nor do petitioners deny that basic precepts of substantial justice require them to rectify their wrongdoing by restoring to the charity the valuable stock they appropriated from it. In urging that certiorari be granted in order to set aside the trial court's order of restoration, petitioners rest wholly upon the formal argument that the names of Attorney General McGrath's successors were not substituted as parties plaintiff within six months after they took office.[2] This failure to substitute, it is said, compels abatement and nullification of the trial court judgment.

Such a harsh result, unrelated to the merits of the action and based exclusively on the technical failure to substitute, should not be countenanced unless compel-

[2] Attorney General McGrath was succeeded in office by James P. McGranery on May 27, 1952. Attorney General Brownell took office on January 22, 1953.

ling reasons make it unavoidable. This would seem to be particularly true here since charitable trusts have always been favorites with courts of equity and it is the duty of the courts themselves to see that charities are properly administered, no matter how many failures in substitution. In this particular case, abatement and reversal would work a serious deprivation on the beneficiaries of the charitable trust and at the same time confirm petitioners' conduct in siphoning off the assets of the charity for their personal gain.

Fortunately, no reason—technical or otherwise—compels the result petitioners seek. To the contrary, there are two decisive reasons which, we submit, call for denial of the petition for certiorari and rejection of the "substitution" argument on which it is based. The first is that there were *two* distinct plaintiffs in this action: (a) the United States as *parens patriae* and (b) Attorney General McGrath (R. 2). Assuming *arguendo* that substitution was necessary as to McGrath, the failure to make such a substitution could not possibly affect the continuation of the action on behalf of his co-plaintiff, the United States as *parens patriae*. Secondly, Rule 25 (d)'s substitution requirement comes into play—as explained in *Snyder* v. *Buck*, 340 U. S. 15, upon which petitioners mistakenly rely—only where coercive relief is sought against a public officer. Here, no such relief was sought as to Attorney General McGrath. There is, therefore, no conflict between the decision below and *Snyder* or any other holding of this Court.

412840—57——2

1. *The failure to substitute Attorney General McGrath's successor cannot abate the action as to the other plaintiff, the United States as parens patriae.*— A basic flaw in petitioners' argument stems from their refusal to recognize the controlling importance of the fact that the action was filed by two plaintiffs and not by former Attorney General McGrath alone. Thus, in their brief below (pp. 35–36), some of the petitioners opened the "substitution" argument with the assertion that "the complaint below * * * was filed September 28, 1951 by 'J. Howard McGrath, Attorney General of the United States * * * in behalf of the unknown beneficiaries of the National Home Library Foundation, a charitable corporation.'" But this assertion is incorrect. The record plainly establishes that the complaint was filed by two separate and distinct plaintiffs: (1) the United States, as *parens patriae,* and (2) Attorney General McGrath (R. 2). This is made crystal clear in the caption itself (R. 2) and in the text of the complaint, which rejects the notion that there is a single plaintiff by explicitly declaring that the two "plaintiffs" in the action are (R. 2, 3):

> (1) the United States as *parens patriae* by its Attorney General *and*
>
> (2) Attorney General McGrath. [Emphasis added.]

The District Court docket entries further confirm the fact that there are *two* distinct plaintiffs, by designating each of the two plaintiffs separately and by listing the United States as *parens patriae,* as plaintiff No. 1 and Attorney General McGrath as plaintiff No. 2.

Rule 25 (d), by its explicit terms, applies only to public officers. *Supra,* p. 2–3. It has no application

to suits filed in the name of the United States, even though such suits necessarily are filed by the United States by and through its law officers, *i. e.*, the Attorney General and the United States Attorney. Petitioners' contrary argument (Pet. 20) cannot be squared with the explicit limitation imposed by the terms of Rule 25 (d) which has never been held to apply to suits by the United States *eo nomine*. See *United States* v. *Allied Oil Corp.*, 341 U. S. 1; *Fleming* v. *Goodwin*, 165 F. 2d 334 (C. A. 8), certiorari denied, *sub nom. Goodwin* v. *United States*, 334 U. S. 828; *United States* v. *Koike*, 164 F. 2d 155 (C. A. 9); *Northwestern Lumber & Shingle Co.* v. *United States*, 170 F. 2d 692 (C. A. 10); see also *Ralph D'Oench Co.* v. *Woods*, 171 F. 2d 112 (C. A. 8); *Seven Oaks* v. *Federal Housing Administration*, 171 F. 2d 947 (C. A. 4).[3]

[3] Petitioners obviously err when they say (Pet. 20) that to hold Rule 25 (d) inapplicable to suits filed by the United States would nullify the rule by permitting "the simple device of adding the name of the United States to the caption of any suit commenced by or against an officer of the United States." The United States cannot be named as a party *defendant* except where Congress has consented by statute; and where consent has been given, the United States should clearly be named. As for suits *by* the Government, if the United States is a proper plaintiff there is no reason why it should not bring the action; if the individual official, and not the United States, were the proper plaintiff (by statute or rule), the United States could not be gratuitously added, and if it were its presence would avail nothing.

There are many instances in which Congress has declared that particular actions should be brought by or against named officers. See, *e. g.*, Section 503 of the Nationality Act of 1940 (discussed at Pet. 23–26). In those cases, the lower courts have been holding that Rule 25 (d) does not apply and that the action does not abate for failure to substitute within the prescribed time. See *infra*, pp. 16–18; for an even more recent example see the Court of Appeals holding and order in *Joseph F. Black, Assistant Regional Commissioner, Alcohol and Tobacco Tax Division (Dallas Re-*

Thus, if the requirements of Rule 25 (d) apply here at all, they apply only to "J. Howard McGrath, Attorney General of the United States," so named and described as the *second* plaintiff in the action (R. 2). But even if the action is viewed as having abated as to him, so that he is no longer in the case, it is inescapable that such an abatement could in no way affect and abate or destroy the rights of the other plaintiff, the United States as *parens patriae*.

This conclusion is in no way weakened by petitioners' erroneous argument that the Attorney General is a "necessary and indispensable party" (Pet. 10). Petitioners themselves concede that "the real-parties-in-interest in suits of this kind" are the unknown beneficiaries for whom the charitable trust was created, rather than the various incumbents of the Attorney General's office, who have no direct or personal interest at stake (Pet. 18). The designation of the Attorney General as a party would merely be a formal means of bringing the matter to the attention of the court. Secondly, even if it is assumed that the "necessary and indispensable party" rule applies to the joinder of plaintiffs as well as defendants, joinder of the individual Attorney General is not essential to enable the court to enter an effective and appropriate final decree in a case of this sort. *Williams* v. *Fanning,* 332 U. S. 490. This is fully shown by the trial court decree entered here. It restores the *status quo* by directing petitioners to

---

gion), *Internal Revenue Service* v. *Magnolia Liquor Company, Inc.*, No. 359, this Term, certiorari granted on other grounds, 352 U. S. 877 (see the Government's petition for certiorari, pp. 1, 23–25).

return the stock to the charity. Obviously, this order can be fully effectuated without any steps being taken either by former Attorney General McGrath or any of his successors.

Thirdly, there is no reason to say that the Attorney General *eo nomine* is the "necessary and indispensable *party*", rather than the United States *eo nomine*. As the Federal Government's law officer, the Attorney General may have to institute actions of this type in the District of Columbia, but petitioners have failed to prove that he must name himself (rather than his government) as the party plaintiff. The interesting English history discussed at Pet. 10–16 shows, we may assume, that the Attorney General is a necessary participant, but it does not demonstrate that the action must be brought in his own name as the complaining *party*, rather than in the sovereign's name; in any event, the formal titles of actions by and against the Government are so different in this country that little help can be obtained from the nomenclature of English cases. As for the American jurisdictions, petitioners' own collection of authorities (Pet. 17–18) proves that the Attorney General is neither necessary nor indispensable *as a party*, by showing that a *parens patriae* action may often be brought "in the name of the state" or "in the name of a beneficiary of the trust". See also the statutory provision for the District of Columbia (where the charity here involved was incorporated) to the effect that in case of misuse or abuse of corporate powers the United States Attorney "shall file in the District Court of the United States for the District of Columbia a petition *in the name of*

the United States" seeking involuntary dissolution of the corporation. District of Columbia Code, Section 29–719 (1951 ed.) (emphasis added).

Finally, we may point out that petitioners' entire argument as to the indispensability of the Attorney General as a party—which is the real basis of the petition—is necessarily one of District of Columbia law on which the decision of the Court of Appeals for the District of Columbia Circuit has unusual finality and which this Court will be loathe to review. *District of Columbia* v. *Pace*, 320 U. S. 698, 702.

2. *Since no coercive relief was sought against Attorney General McGrath, the failure to substitute a successor within six months has not abated the action.*—Up to this point we have shown that, even if the action is deemed to have abated as to Attorney General McGrath, it has not abated as to the United States, as *parens patriae*. Wholly apart from that consideration, we now show that the six-month substitution requirement of Rule 25 (d) applies only where coercive relief is sought against a public officer, and that it therefore does not apply here.

a. *The history and purpose of Rule 25 (d)*.—Rule 25 (d) is the modern version of legislation originally adopted by Congress on February 8, 1899 (30 Stat. 822) in response to this Court's suggestion in *United States ex rel. Bernardin* v. *Butterworth*, 169 U. S. 600. Prior to the 1899 statute, the history of writs sued out against Federal officers to compel performance of official acts clearly established that the death, resignation, or expiration of the term of office of the defendant *pendente lite* compelled the action to abate

and forced the plaintiff to sue out another writ against the new incumbent.

Almost 90 years ago, this Court, in a suit against a Secretary of the Interior, recognized that "[w]hen he resigned, of course the suit abated." *The Secretary* v. *McGarrahan,* 9 Wall. 298, 313. This ruling was uniformly followed in all other cases reaching the Court which concerned the same question. *United States* v. *Boutwell,* 17 Wall. 604, 609; *Commissioners* v. *Sellew,* 99 U. S. 624, 626; *United States* v. *Schurz,* 102 U. S. 378, 408; *Thompson* v. *United States,* 103 U. S. 480, 484; *United States* v. *Chandler,* 122 U. S. 643; *United States ex rel. International Contracting Co.* v. *Lamont,* 155 U. S. 303, 306; *United States ex rel. Long* v. *Lochren,* 164 U. S. 701. And, as early as 1897, it was noted that the principle of abatement because of resignation from office had already "for years been considered as so well settled that in some of the cases no opinion has been filed and no official report published." *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28, 31.

The reason for this common law rule is that resignation from office means that the officer "no longer possesses the power" to perform the official act demanded of him. *The Secretary* v. *McGarrahan,* 9 Wall. 298, 313. Since his duty to perform that act "exists only so long as office is held, the court cannot compel [him] to perform it after his power to perform has ceased." *United States* v. *Boutwell,* 17 Wall. 604, 608. In short, the sole rationale of the common law rule of abatement, which deprived a plaintiff of relief because of a fortuitous succession in office, was

that the defendant-officer's resignation rendered him powerless to perform the required official act. And since a judgment against an ex-officer directing him to perform the act would be futile and ineffective, to abate or prevent the continuation of the action would be warranted.

Butterworth, supra, p. 12, was such a suit. It sought to compel the Commissioner of Patents to issue a patent. Obviously, this was the type of act the Commissioner could be forced to perform only as long as he held office. Consequently, in line with its earlier holdings in similar coercive relief cases, this Court abated the action on the Commissioner's death. At the same time, the Court suggested the need and desirability of a statute which would prevent abatement and allow an action, in which coercive relief was sought against an officer, to continue against his successor.

Soon thereafter, H. R. 6901, entitled "A bill to prevent the abatement of certain actions," was introduced in the 2d Session of the 55th Congress, 31 Cong. Rec. 779. The discussion of the bill, in both the Senate and House, removes all doubt that the bill was designed to meet the need expressed in the *Butterworth* case. 31 Cong. Rec. 3866; 32 Cong. Rec. 492–493. The Report of the House Committee on the Judiciary, reporting the bill favorably, is devoted chiefly to a discussion of that case. H. Rep. No. 960, 55th Cong., 2d Sess. As enacted on February 8, 1899 (30 Stat. 822), the Act allowed the continuation of an action after the incumbent's separation from office, provided a timely substitution was effected.

But it is plain the Act was not intended to affect—nor was there any need to affect—the situation where no coercive relief was demanded against a named, individual public officer. In that case, the departure of the officer from office did not make impossible the grant of effective relief and hence did not result in common law abatement. *Thompson* v. *United States,* 103 U. S. 480; *Commissioners* v. *Sellew,* 99 U. S. 624; *Murphy* v. *Utter,* 186 U. S. 95; *Marshall* v. *Dye,* 231 U. S. 250, 255; *Irwin* v. *Wright,* 258 U. S. 219, 224. As summarized by the Court of Appeals in *Fleming* v. *Goodwin* (165 F. 2d 334, 337 (C. A. 8), certiorari denied, *sub nom. Goodwin* v. *United States,* 334 U. S. 828):

> * * * The purpose of the Rule, like that of the statute which it superseded, was to provide for the continuance of an action, personal in character, brought by or against a public officer, where a substantial need for continuing the action existed and the action could not, without statutory authority, be maintained against his successor after the officer had ceased to hold office. The statute therefore was intended to cover only such actions, to which a public officer was a party, as would abate upon his separation from office. The need for the statute did not arise out of the death or resignation of Government officers who had brought actions on behalf of the Government. * * *

Although the 1899 Act was replaced by Section 11 of the Judiciary Act of 1925 (43 Stat. 936, 941, 28 U. S. C. (1934 ed.) 780), which in turn was omitted from the revision of Title 28 in 1948 for the stated reason that the same ground is covered by Rule 25

412840—57——3

(d) (H. Rep. No. 308, 80th Cong., 1st Sess., A. 239), there is nothing in the subsequent history of the provision to indicate that its purpose was ever changed from "remedy[ing] the situation revealed in Boutwell [*supra*, p. 13]." *Acheson* v. *Fujiko Furusho*, 212 F. 2d 284, 295 (C. A. 9); *Chew Yin* v. *Acheson*, 216 F. 2d 60, 61 (C. A. 7). It follows that the 1899 statute, its 1925 revision, and the present version appearing in Rule 25 (d) require substitution within the period fixed by the statute or rule only where the action is one in which coercive relief is sought against the defendant officer. In all other situations the action would not abate at common law, and hence substitution within the fixed period was unnecessary.

b. *The decisions.*—The decisions uniformly support this view that failure to substitute within six months is not fatal where, as here, no coercive relief is sought against the named incumbent official. Thus, despite the failure to effect substitution within Rule 25 (d)'s six-month period, the Courts of Appeals for the Third, Seventh, Ninth, and Tenth Circuits have refused to abate actions seeking a declaration as to nationality status on the ground, among others, that those actions did not seek to compel or coerce the named officers to perform some official duty or act. *Acheson* v. *Fujiko Furusho*, 212 F. 2d 284 (C. A. 9); *Lehmann* v. *Acheson*, 214 F. 2d 403 (C. A. 3); *Tom Wing Po* v. *Acheson*, 214 F. 2d 661 (C. A. 10); *Chew Yin* v. *Acheson*, 216 F. 2d 60 (C. A. 7); see *Northwestern Lumber & Shingle Co.* v. *United States*, 170 F. 2d 692 (C. A. 10). This consistent interpretation of Rule 25 (d) shows, we submit, that there is now no such confusion as petitioners assert (Pet. 21).

Moreover, *Buck* v. *Snyder*, 179 F. 2d 466, an earlier decision of the District of Columbia Circuit affirmed here, 340 U. S. 15, is neither in conflict with the foregoing cases nor with the ruling handed down by the court below in the present case.[4] *Snyder*, far from supporting petitioners, actually strengthens the view that abatement will result from a failure to comply with Rule 25 (d) only when coercive relief is sought against the named defendant. For *Snyder* presented just such a situation. The record shows that the plaintiff filed a petition for a writ "of mandamus to compel" Rear Admiral Buck, then Paymaster General of the Navy, to pay a certain death gratuity. The District Court issued a mandatory injunction against Buck as Paymaster General, directing him to pay plaintiff the death gratuity. On appeal, the court below held that the action had abated because of the failure to substitute Buck's successor within six months.

In affirming, this Court stressed the fact that the District Court "writ that issued against Buck related

[4] Nor is there any conflict with the other decision relied on by petitioners—*Fix* v. *Philadelphia Barge Co.*, 290 U. S. 530. In that case, a new suit had been brought in the name of a successor Collector of Internal Revenue on a bond executed to a named Collector "or his successors", after an earlier suit had been held by a District Court to be abated for failure to comply with 28 U. S. C. 780, the statutory predecessor of Rule 25 (d). The question before this Court related not to the survival of a specific pending action but rather to the survival of the *cause of action* itself. The Court, in deciding that the cause of action had not abated, had no occasion to, nor did it, pass upon the propriety of the District Court's holding that the earlier action had abated. Indeed, in discussing the impact of the Act of 1899, the Court specifically recognized its limited and "purely remedial" purpose. 290 U. S. 530, 533.

to a duty attaching to the office. The duty existed so long and only so long as the office was held. When Buck retired from office, his power to perform ceased. He no longer had any authority over death gratuity allowances." 340 U. S. 15, 18. Then, dispelling all doubt that abatement was called for only because it involved coercive relief against Buck, the Court expressly noted that what plaintiff had sought and obtained from the District Court was a "coercive judgment." 340 U. S. 15, 20.

c. The instant case.—It cannot be denied that no coercive relief was sought against Attorney General McGrath. It was not sought to compel him to perform any official act or duty. To the contrary, he was a co-plaintiff in an action which sought primarily a declaration that certain stock transfers were invalid and that the rightful owner of the stock was the charity rather than petitioners. It follows, we submit, that even as to the Attorney General the action has not abated despite the failure to substitute McGrath's successor within six months.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
MORTON HOLLANDER,
Attorneys.

JANUARY 1957.

APPENDIX

Findings of Fact and Conclusions of Law of the District Court

OCTOBER 22, 1954

Findings of Fact

1. This suit was brought by the United States as parens patriae in behalf of the unknown beneficiaries of the National Home Library Foundation to cancel transfers its trustees made of 1600 shares of Longfellow Building Corporation stock. The return to the Foundation is sought of 1500 shares from the defendant, Mount Vernon Mortgage Corporation, and 100 shares from the defendant, Fannie Sessions Mittell.

2. The National Home Library Foundation (hereinafter called called the Foundation) is a charitable corporation organized in 1932 under the District of Columbia law relating to charitable, educational, religious and missionary societies. Its charter states:

> The particular business and objects of this corporation are to promote and inculcate in more people the desire to read good literature; to make home libraries more easily available to greater numbers of our population; to urge the reading of good literature through printed announcements, radio broadcasts and newspapers; and to these ends to provide for the delivery and holding of lectures, exhibits, public meetings, classes and conferences, calculated to advance the cause of education and promote the general culture of the nation; and for these purposes to do and perform every lawful act and thing necessary and expedient to be

done or performed and which may be convenient or advantageous for the efficient conduct of its affairs; and to have and exercise all powers conferred by the laws of the District of Columbia upon corporations organized under sub-Chapter 3 (Code of March 4, 1929, Title 5, Chapter 5 of the incorporation laws of the District of Columbia).[1]

3. The Foundation by the Spring of 1938 had an Advisory Board of sixty distinguished men and women representative of American culture and education. At that time the Foundation was a pioneer in publishing small, cheap, pocket editions of literary masterpieces. It provided these books free or at cost[2] to Army posts, lighthouses, ships, prisons, hospitals, libraries and universities. It also carried out a program to improve cultural conditions in rural sections in cooperation with farm bureau federations, churches, schools, and rural publications, and through the Carnegie Endowment for International Peace sent editions of English classics to interested folk throughout the world.[3] For a year it conducted an educational radio program. The "Foundation seemed to have a reasonable chance of real success" until its work was interrupted by the Pearl Harbor incident.[4]

4. The Longfellow Building Corporation—the corporation issuing the stock involved in this suit—was organized in 1939 under the laws of Delaware, and began doing business in the District of Columbia. Its principal or only asset is a large, modern, twelve story office building in a desirable business area in

[1] The reference to sub-Chapter 3 pertains to Chapter 854, 56th Congress, Second Session, 1901, 31 Stat. 1283, presently Secs. 29-601 to 606 of the District of Columbia Code of 1951.

[2] The Foundation Minutes of February 12, 1932 indicate that books sold were to be at cost of production and distribution.

[3] Pl.'s Ex. 28 and 29.

[4] Record, p. 222.

Washington, D. C., being located on the Northeast corner of Connecticut and Rhode Island Avenues, Northwest, about a block from the Mayflower Hotel and opposite the statue of the poet, Longfellow. From the time of its completion early in 1941 the building has been continuously rented to the United States except the first floor which since its release by the Government has been used for stores.

5. The defendant, Mount Vernon Mortgage Corporation (hereinafter called Mt. Vernon) is a corporation organized under the laws of Delaware. It began operating in the District of Columbia in 1938, and is engaged in the real estate, investment and insurance business.

6. The defendant, Fannie Sessions Mittell, now Mrs. Ludwig Caminita (hereinafter called Mrs. Mittell) became secretary of the Foundation on February 19, 1940 and a trustee of the Foundation on April 1, 1940. She became second vice-president and a director of Longfellow Building Corporation (hereinafter called Longfellow) on July 22, 1942, and has since continuously held such positions.

7. The defendant, Robert T. Highfield (hereinafter called Mr. Highfield) was a trustee of the Foundation from April 1, 1940 until March 19, 1941. He has been a director of Mt. Vernon since March 5, 1938, its secretary-treasurer from March 5, 1938 until December 1944, and its president and treasurer since December, 1944. He is and has been since April 2, 1940 a director and treasurer of Longfellow. He became president thereof in July 1942 and still holds that office.

8. The defendant, L. Harold Sothoron (hereinafter called Mr. Sothoron) was a trustee of the Foundation from April 1, 1940 until March 19, 1941. He is and has been a director and the general counsel of Mt. Vernon since 1938 and is also a vice-president of it

at the present time. He has been a director and vice-president of Longfellow since 1940 and holds such positions at the present time.

9. The defendant, E. Flavelle Koss (hereinafter called Mr. Koss) has been a director and officer of Mt. Vernon since 1938, and at present is a director thereof and its secretary and vice-president. He is and has been a director and assistant secretary and assistant treasurer of Longfellow since April 1940.

10. Sherman F. Mittell (hereinafter called Mr. Mittell) is the deceased husband of the defendant, Mrs. Mittell. He was the principal founder of the Foundation and of Longfellow, and was president of each from its inception until his death July 12, 1942.

11. Sidney Acey Carraway (hereinafter called Mr. Carraway) was elected a trustee and president of the Foundation in August 1942 to fill the vacancy created by the death of Mr. Mittell.

12. Robert C. Craig (hereinafter called Mr. Craig) was elected a trustee of the Foundation in July 1940.

13. In December 1943, there were three (3) trustees of the Foundation, Mrs. Mittell, Mr. Carraway and Mr. Craig. The last meeting of the trustees was on December 9, 1943. Each of them from that day forward considered that the Foundation had ceased to exist and that their trusteeship had ended. The Foundation's charter declares the term of its existence as perpetual, however, and no dissolution has been judicially decreed. Of the three trustees, only Mrs. Mittell is a party to this action. The other two were witnesses at the trial and are informed as to the issues involved.

14. The early history of the Longfellow building is tied in with the acquaintanceship of Mr. Mittell and Mr. Craig. In 1938 and 1939 Mr. Craig was deputy administrator of the Rural Electrification Adminis-

tration. He was charged with locating office quarters for that administration. After considerable frustration in that task he suggested to Mr. Mittell the idea of constructing an office building to be financed primarily by a first trust loan from Reconstruction Finance Corporation. Neither Mr. Mittell nor the Foundation had any funds. Nevertheless, Mr. Mittell set out to bring the idea to realization. Mr. Craig was not then a trustee of the Foundation.

15. To Mr. Mittell the work of the Foundation "was a great crusade."[5] He planned the Longfellow building as a source of income for the Foundation. It was his view that from its Longfellow stock the Foundation "should be able in future years to derive a material income available for use in carrying forward the Foundation's purposes and program."[6] The plan as of April 1940 was for the Foundation to "own 864 shares of stock of the building corporation", Mt. Vernon to "receive 667 shares out of the 2,000 shares of stock of the building corporation" and "other parties who * * * participated in the necessary work" to "receive in the aggregate 469 shares."[7]

16. The Foundation, Mr. Highfield and Mr. Sothoron, on April 2, 1940, ratified said plan and authorized the officers of the Foundation to execute the same.

17. The financing of the Longfellow building was arranged as follows: The Reconstruction Finance Corporation gave a commitment to Longfellow to make a first trust loan of $1,500,000 toward the acquisition of the land and the erection of the building, subject to the conditions among others that Longfellow have cash capital of $150,000 and that a guaranty be given by a financially responsible party to

[5] Record, p. 222.
[6] Pl.'s Ex. 1, Minutes of April 2, 1940.
[7] Ibid.

furnish such sums, if any, as might be needed over and above the aforementioned $1,650,000 to complete the building and discharge the obligations of Longfellow until 80 per centum of the office space should be leased to tenants satisfactory to the Reconstruction Finance Corporation. This guaranty was given by Mt. Vernon pursuant to an agreement between Mt. Vernon, Longfellow and the Foundation whereby Mt. Vernon for any such funds it might advance would receive a note or notes from Longfellow carrying 6% interest to be secured by a second deed of trust on the building; Mt. Vernon would pay to the Foundation $5,000; the Foundation would transfer to Mt. Vernon 667 shares of Longfellow stock; Mt. Vernon would have the right to place all insurance and be employed to operate and manage the building for a management fee of $4,500 or $9,000 per year for the first 5 years, depending upon whether the lease should be on a net or gross basis. In April 1940 Mt. Vernon acquired said 667 shares of Longfellow stock. During the course of construction of the Longfellow building the cash advances (loans) made by Mt. Vernon under said agreement totalled $139,032.21.

18. The source of Longfellow's cash capital of $150,000 (referred to in the preceding paragraph) is as follows: Longfellow borrowed from the building contractor, John McShain, Inc., $140,000 and paid said sum to the Foundation for services rendered.[8] The Foundation then paid to Longfellow for 300 shares of Longfellow stock the said $140,000 plus $10,000 additional—a total of $150,000. Said $10,000 consisted of a loan of $5,000 from Mt. Vernon and the $5,000 which

[8] The services rendered to Longfellow by the Foundation for said $140,000 are not clearly spelled out but Mr. Sherman F. Mittell as an officer of the Foundation was engaged in laborious activities over an extended period of time concerning the planning, financing and promotion of the Longfellow building project.

Mt. Vernon paid the Foundation under the guaranty agreement set out in the preceding paragraph. Out of proceeds from the first trust John McShain, Inc. was eventually repaid the $140,000 by Longfellow.

19. The Longfellow building was completed February 3, 1941, and the Government began occupying all of the approximately 155,400 net square feet of floor space. The annual rent was $203,634.48 payable $16,969.45 per month. The first lease ran from February 3, 1941 to June 30, 1942, with option in the lessee to renew from year to year until June 30, 1945, subject to adjustment of rental terms at each renewal period according to a rent formula established by the Reconstruction Finance Corporation Mortgage Company in an agreement with Longfellow. During any renewal period the Government upon written notice might terminate the lease effective at the end of the month following the month in which such notice is given.

20. Pursuant to the plan for the Foundation to own 864 shares of Longfellow stock, the Foundation acquired exactly that number exclusive of the 667 shares transferred to Mt. Vernon under the guaranty agreement and 100 shares transferred to a lawyer who had worked on the building project. The 864 shares were acquired by a series of transactions. The Foundation paid Longfellow as already stated $150,000 for 300 shares or $500 per share. An option to buy for $250,000 the key portion of the building site was obtained by the Foundation in 1939 and in 1940 it conveyed said portion to Longfellow for the same cash consideration plus 360 shares of Longfellow stock (at an estimated value of $180,000 or $500 per share). From John McShain, Inc., the Foundation acquired 174 shares. Mr. Roy S. Thurman and Mr. Mittell transferred to the Foundation 30 shares (or fifteen each). The Shares hereinbefore underlined total 864 but this number was reduced to 839 shares when the

Foundation on January 22, 1941, disposed of 25 shares.[9]

21. The said 839 shares represent the Longfellow stock owned by the Foundation as of January 14, 1942. On that date, however, a resolution was passed by the Foundation authorizing the borrowing from Mt. Vernon of $12,000 at 6% interest and the pledging of 931 shares to secure the loan (92 more shares than the 839 owned by the Foundation). Mr. Mittell in his own right owned one certificate for 3 shares and one certificate for 91 shares—or 94 shares in all. On January 15, 1942—the date the loan was made—the Foundation's 839 shares and Mr. Mittell's 94 shares (a total of 933 shares) were put up as collateral for the loan.[10]

22. Mr. Mittell transferred his 94 shares to the Foundation only for use by it as collateral for a loan, and he did not intend to part with his ownership of said shares.[11]

---

[9] Stock book references to the shares mentioned in paragraph 20 are as follows: Pl.'s Ex. 2A, Certfs. 22, 8, 9, 10, 15, 19 and 16 and reverse side of each certificate. Pl.'s Ex. 2B, Certfs. 27 and 28 and Pl.'s Ex. 2A, Certfs. 25, 18 and 6 and reverse side of each. The shares Thurman transferred originally belonged to Wm. Lescaze, the architect of the building, as certificate 18 which was replaced by certificate 40.

[10] The certificate for 3 shares was issued to Mr. Mittell in July, 1939. Pl.'s Ex. 2A, Cert. 1. The certificate for 91 shares was issued to him in April 1940. Pl.'s Ex. 2A, Cert. 20. But these 91 shares came out of original certificate 3 issued in July 1939 as indicated on the reverse side of said certificate 3. Mr. Mittell signed blank stock powers and attached one to each of his certificates which at the time of the loan were cancelled and certificate 41 was issued to the Foundation in lieu of original certificate 1 and certificate 42 in lieu of certificate 20.

[11] See Mr. Mittell's statement to Mr. Highfield at the time of the transfer. Record, p. 193. It is admissible under the verbal act doctrine, Wigmore, 3rd, Ed., Sec. 1772–1777, to show Mr. Mittell intended to loan said shares to the Foundation.

23. In late December 1942 following the death of Mr. Mittell in July of that year, Mr. Highfield initiated negotiations with Mrs. Mittell for the sale to Mt. Vernon of the 933 shares of Longfellow stock which the Foundation had pledged for the $12,000 loan from Mt. Vernon. At that time Mrs. Mittell was emotionally disturbed, troubled and in poor health, and wanted to pay the Foundation's debts and wind up its affairs. Mr. Highfield was well aware of these circumstances.

24. The defendant, Mr. Highfield, was the agent of the defendant, Mt. Vernon, and its other directors to conduct the negotiations with the Foundation for the disposition of the 933 shares of Longfellow stock referred to hereinabove.

25. At the time of said negotiations the trustees of the Foundation were Mrs. Mittell, Mr. Craig and Mr. Carraway. They knew very little about the financial affairs of Longfellow. Mrs. Mittell had been a member of the Board of Directors of Longfellow and an officer thereof for about six months but had attended no meetings of the Board during that period. She had seen financial reports of Longfellow but did not pay any particular attention to them as she was concerned with other problems. She did not know what the expenses or profits were in connection with the operation of the building during 1942. Mr. Craig and Mr. Carraway were likewise uninformed except that Mr. Craig knew about the original financing of the building and the rent agreement. The trustees were unaware of the book value of the Longfellow stock, and made no effort to ascertain it. The number of shares owned by the Foundation in relation to the total shares outstanding was unknown to the trustees as was the fact that the Foundation was the controlling stockholder. They sought no independent advice as to the market value of the stock or the other assets of

the Foundation. They made no effort to learn the value of the Longfellow Building or Longfellow's equity therein. They did not try to sell the stock to anyone other than Mt. Vernon.

26. On January 19, 1943 Mt. Vernon purchased 833 shares of Longfellow stock from the Foundation for the sum of $27,905.50 or $33.50 per share. This sale was consummated by the payment of $15,153.50, being the balance of the said purchase price after deducting a transfer tax, the $12,000 loan and interest thereon amounting to $728, being the loan referred to in paragraph 21. Mt. Vernon still owns said 833 shares. The purchase of these 833 shares by Mt. Vernon gave Mt. Vernon control of Longfellow since Mt. Vernon thereupon became the owner of 1500 of the 2000 authorized shares of Longfellow stock.

27. Mr. Highfield and Mr. Sothoron advised Mrs. Mittell in January 1943 that she should take 100 shares of Longfellow stock from the 933 shares the Foundation pledged to secure the loan from Mt. Vernon, and that Mt. Vernon was purchasing 833 shares at $33.50 per share. Until this time Mrs. Mittell had believed Mt. Vernon was going to purchase 933 shares from the Foundation at a price sufficient to pay the Foundation's debts. Mr. Highfield explained to Mrs. Mittell that 94 of the shares pledged for the loan from Mt. Vernon belonged to her late husband, Mr. Mittell, and that 6 shares were being added to the 94 to make it an even hundred so that Mr. Mittell's son—then a year old—"will have this hundred shares in his father's building." [12]

28. Despite the events related in the preceding paragraph, on February 19, 1943 said 100 shares were transferred by the foundation to Mrs. Mittell purportedly in part payment of an alleged loan in the

[12] Record, p. 55.

amount of $12,000 from her to the Foundation. The evidence does not establish the existence of such a loan. Mrs. Mittell still owns said 100 shares.

29. In early 1943 when the Foundation's stock was sold, the signs of the times presaged a successful future for the Longfellow building. During the depression years of the thirties building construction declined and during World War II restrictions on private building projects were imposed. There was a marked shortage early in 1943 of office space in Washington and a pressing need for housing for agencies of the federal government and otherwise. There was an upswing in the real estate market.

30. Taking into consideration only those factors which a purchaser under fair market conditions would consider as of January 15–19, 1943, the fair market value of the Longfellow building was then Two Million ($2,000,000) Dollars. At that time, however, the property was encumbered by the first and second trusts to which reference has already been made.[13] The books of Longfellow as of December 31, 1942 reflected a net worth, or capital and surplus of $545,712.90.

31. The total outstanding number of shares of Longfellow as of December 31, 1942 was 2000. The book value at that time was at least $176 per share.

32. On January 19, 1943 prior to the sale of 833 shares of Longfellow stock to Mt. Vernon, the Foundation owned 839 shares of Longfellow's outstanding stock and was the majority stockholder in Longfellow.

33. On January 15–19, 1943 the fair market value of 833 shares of stock of Longfellow was $123 per share or $102,459. The fair market value of 6 shares at said time and in February 1943 was $123 per share or $738.

---

[13] These trusts had been reduced by monthly payments.

34. Mt. Vernon, Mrs. Mittell, Mr. Highfield, Mr. Sothoron, and Mr. Koss knew, or should have known, that the fair market value of Longfellow stock on said dates was far greater than $33.50 per share, and that the then book value of said stock was at least $176 per share.

35. Mr. Highfield and his wife and Mr. Sotboron during the periods covered by this section were intimate friends of Mrs. Mittell. Mr. Highfield and Mr. Sothoron acted as advisers to Mrs. Mittell, in her personal affairs and in the affairs of the Foundation from July 1942 through February 19, 1943 and thereafter.

36. Between July 12, 1942 and February 19, 1943 none of the creditors of the Foundation was pressing for payment. The principal creditors at that time were the H. Wolff Book Manufacturing Company, Inc. and Mt. Vernon. The former offered to write off the indebtedness as a bad debt and the latter to extend time for payment. Mrs. Mittell disclosed this to Mr. Highfield but failed to disclose it to Mr. Carraway or Mr. Craig, although Mr. Highfield told Mr. Craig that Mt. Vernon would extend the time for repayment of the $12,000 loan.

37. Mr. Carraway and Mr. Craig took little active part in the management or purported liquidation of the Foundation, leaving most such matters to Mrs. Mittell.

38. Mr. Carraway took no part in the disposition of 933 shares of Longfellow stock by the Foundation in early 1943 save acquiescence in and ratification of such action.

39. Mr. Carraway and Mr. Craig were motivated by sympathy and friendship for Mrs. Mittell when they ratified the transfer to her in 1943 of Longfellow stock, and by said sentiments and their desire to aid her in ridding herself of the Foundation and its debts

when they authorized in 1943 the sale to Mt. Vernon of Longfellow stock.

40. The transactions whereby the Foundation's 839 shares of Longfellow stock were disposed of were not conducted at "arm's length".

41. The trustees of the Foundation in selling and disposing of the Foundation's shares of Longfellow stock in early 1943 acted contrary to the interests and purposes of the Foundation and its unknown beneficiaries.

42. Mrs. Mittell, aided and abetted by Mr. Craig and Mr. Carraway, also disposed of the assets of the Foundation, other than the Longfellow stock, and dealt with the proceeds therefrom in a manner inconsistent with the prudence and propriety required of her as a trustee.

43. The transfer by Mrs. Mittell, Mr. Carraway and Mr. Craig of Longfellow stock to Mrs. Mittell in February 1943 was without consideration.

44. The transfer by Mrs. Mittell, Mr. Carraway and Mr. Craig of the 833 shares of Longfellow stock to Mt. Vernon in January 1943 was for a grossly inadequate consideration.

45. Since Mt. Vernon acquired the 833 shares of stock referred to in paragraph 26 it has received in dividends upon said stock $174,930.

46. Since Mrs. Mittell acquired the 100 shares of stock referred to in paragraphs 27 and 28 she has received in dividends upon said stock $21,000 or $19,740 upon the 94 shares which belonged to her deceased husband and $1,260 upon the 6 shares belonging to the Foundation.

47. On May 3, 1950 Abe Lincoln Mahoney filed in this court Civil Action No. 1979–50 against the Foundation, Longfellow, Mt. Vernon, Mr. Highfield, Mr. Sothoron, George Morris Fay, United States Attor-

ney, and others. The action was dismissed by the court. The defendants herein assert that the subject matter of this action is *res judicata* by reason of Civil Action No. 1979–50.

48. The evidence does not sustain the defendants' claim of estoppel or laches.

Conclusions of Law

1. The court has jurisdiction of this action.

2. The National Home Library Foundation is a charitable corporation, presently existing in the District of Columbia, and the United States as parens patriae has authority to bring this action on behalf of the unknown beneficiaries of the Foundation.

3. The parties, issues, and disposition of the action in *Mahony* v. *National Home Library Foundation*, Civil Action 1979–50, were not such as to warrant application of the doctrine of res judicata to this action.

4. This action is not barred by estoppel, laches or any statute of limitations.

5. There was no breach of trust in the transfer by the Foundation in April, 1940 of 667 shares of the common stock of the Longfellow Building Corporation to Mt. Vernon Mortgage Corporation, the consideration for said transfer being adequate.

6. The trustees of the Foundation occupied a fiduciary relationship to it and its unknown beneficiaries. In negotiating the sale of 833 shares of the Longfellow stock in January, 1943 to Mt. Vernon Mortgage Corporation, said trustees failed to inform themselves of the value of the stock and failed to exercise the caution, care and skill which a man of ordinary prudence would exercise in dealing with his property. Due to their failure to perform their duties, the trustees transferred said 833 shares of stock for a shockingly

inadequate consideration, and they thereby breached their trust.

7. The purchaser of the 833 shares of stock, Mt. Vernon Mortgage Corporation, had notice of the breach of trust, and took the stock with such notice.

8. The sale of 833 shares of the Longfellow stock by the Foundation to Mt. Vernon Mortgage Corporation must be set aside and said shares returned to the Foundation.

9. Mt. Vernon Mortgage Corporation must pay to the Foundation a sum equal to the amount of the dividends received by the corporation on the 833 shares less the amount paid by the corporation for the purchase of said shares.

10. Of the 100 shares of Longfellow stock transferred by the trustees of the Foundation to Mrs. Mittell, 94 shares belonged to Mr. Mittell. The remaining 6 shares belonged to the Foundation and no consideration was given for them by Mrs. Mittell.

11. The transfer of 6 shares of the Longfellow stock by the Foundation to Mrs. Mittell must be set aside and said shares returned to the Foundation.

12. Mrs. Mittell must pay to the Foundation a sum equal to the amount of the dividends received by her on the 6 shares.

13. The trustees of the Foundation have impliedly renounced their offices. It is necessary for the court to appoint successor trustees, and the court will retain jurisdiction of this action for that purpose.

Counsel for plaintiff will submit a proposed judgment in accordance herewith.

BURNITA SHELTON MATTHEWS,
Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1937